Supreme Court, U.S.
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No. 01-___

IN THE

Supreme Court of the United States

GLOBAL NAPS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

AND

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of this Court's longstanding precedent in *ICC v. American Trucking Ass'ns*, 467 U.S. 354 (1984), may the Federal Communications Commission retroactively invalidate an interstate carrier's effective tariff without identifying any statutory provision that the tariff offends, solely because the tariff was found to conflict with agency regulations in a post-effectiveness challenge to its lawfulness?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following parties intervened in the proceeding in the District of Columbia Circuit:

Bell Atlantic-Delaware, Inc.
Bell Atlantic-Maryland, Inc.
Bell Atlantic-New Jersey, Inc.
Bell Atlantic-Pennsylvania, Inc.
Bell Atlantic-Washington, D.C., Inc.
Bell Atlantic-Virginia, Inc.
Bell Atlantic-West Virginia, Inc.
New York Telephone Company
New England Telephone and Telegraph Company

The companies above now operate under the name "Verizon Communications."

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that the parent company of Global NAPs, Inc. is Ferrous Miner Holdings, Ltd., a Delaware corporation, and that no publicly held corporation has a ten percent or greater ownership interest in Global NAPs, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Global NAPs, Inc. respectfully requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit. As noted below, this case is also appropriate for summary disposition pursuant to SUP. CT. R. 16.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is published at 247 F.3d 252 (D.C. Cir. 2001) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-14a. The *Order on Reconsideration* of the Federal Communications Commission ("FCC") is published at 15 F.C.C.R. 5997 (2000) and is reproduced at Pet. App. 15a-35a. The *Memorandum Opinion*

and Order of the FCC is published at 15 F.C.C.R. 12946 (1999) and is reproduced at Pet. App. 36a-57a. The court of appeals' order denying the petition for rehearing is unpublished. That order is reproduced at Pet. App. 58a.

JURISDICTION

The court of appeals entered judgment on April 27, 2001, and denied timely petitions for rehearing on June 29, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 10 of the Communications Act, codified at 47 U.S.C. § 160, authorizes the FCC to "forbear" from applying provisions of that Act to telecommunications carriers in certain circumstances. The complete text of Section 10 is reproduced at Pet. App. 59a-60a.

Section 201 of the Communications Act, codified at 47 U.S.C. § 201, requires common carriers to offer their services at just and reasonable rates. The complete text of Section 201 is reproduced at Pet. App. 60a-61a.

Section 203 of the Communications Act, codified at 47 U.S.C. § 203, requires common carriers to offer their services pursuant to tariffs filed with the FCC. The complete text of Section 203 is reproduced at Pet. App. 62a-63a.

Sections 203-205 of the Communications Act, codified at 47 U.S.C. §§ 203-205, give the FCC several tools to ensure that carrier tariffs are, and remain, just and reasonable, including the authority to review, revise, and suspend carrier tariffs if the FCC believes that there is a question of the lawfulness of the tariff. The complete texts of Sections 203-205 are reproduced at Pet. App. 62a-66a.

Section 208 of the Communications Act, codified at 47 U.S.C. § 208, establishes a complaint procedure by which private parties adversely affected by a carrier's actions may

obtain redress from the harm that they have suffered by virtue of the carrier's action. The complete text of Section 208 is reproduced at Pet. App. 67a-68a.

Section 251 of the Communications Act, codified at 47 U.S.C. § 251, prescribes rules designed to fundamentally restructure the local exchange market in order to foster competition in the delivery of telecommunications services. The complete text of Section 251 is reproduced at Pet. App. 68a-76a.

Section 252 of the Communications Act, codified at 47 U.S.C. § 252, establishes procedures for the negotiation, arbitration, and approval of interconnection agreements between local exchange carriers. The complete text of Section 252 is reproduced at Pet. App. 76a-83a.

INTRODUCTION

This case involves the review of a federal appellate court decision upholding an order of the Federal Communications Commission ("FCC") that retroactively invalidated an effective interstate tariff filed by Global NAPs, Inc. ("Global NAPs"), the petitioner here. The FCC retroactively invalidated Global NAPs' tariff, thereby rendering it void *ab initio*, solely on the basis of the agency's finding, after a complaint by another affected carrier, that the tariff violated two of the agency's rules.

In *ICC v. American Trucking Ass'ns*, 467 U.S. 354 (1984) ("*American Trucking*"), this Court addressed the circumstances under which an agency may impose what the Court acknowledged to be a severe penalty—retroactive cancellation of an effective tariff. The Court held that when an agency's enabling statute does not expressly provide for retroactive revocation of tariffs, the agency has the implied power to do so only if retroactive revocation (1) furthers a "specific statutory mandate" of the agency, and (2) is "directly and closely tied to that mandate." *Id.* at 367.

The Communications Act does not give the FCC express authority to revoke effective tariffs. Under *American Trucking*, this means that the FCC may retroactively cancel a tariff only if exercising that authority in a particular case furthers a specific statutory mandate and is directly and closely tied to that mandate. In its decisions below, the FCC neither addressed *American Trucking* nor identified a specific statutory mandate (or any statutory mandate at all) which the tariff supposedly contravened in a manner warranting retroactive invalidation.

In affirming the FCC, the D.C. Circuit panel below referred to *American Trucking*, but contradicted its holding. Under *American Trucking*, the prerequisite for retroactive invalidation is a conflict between the tariff and a specific congressional mandate to the agency. But the court below wrote Congress out of the picture by holding that the FCC could retroactively invalidate Global NAPs' tariff merely because it conflicted with the FCC's own regulations. The court thus eliminated entirely the requirement in *American Trucking* that the imposition of the drastic penalty of retroactive invalidation of a tariff must be tied (and closely so) to a ***statutory*** mandate.

Consequently, the D.C. Circuit's decision, if left to stand, vastly expands the power of federal agencies to retroactively void effective tariffs, irrespective of any statutory evidence that Congress intended an agency to have that power. In so doing, the court below erroneously dispensed with this Court's longstanding precedent.

STATEMENT OF THE CASE

Global NAPs provides telecommunications services to customers in Massachusetts and other states. Among Global NAPs' customers are Internet Service Providers ("ISPs") and other carriers, including Verizon Communications ("Verizon"). Global NAPs competes with Verizon for the business

of end user customers. It also provides services to Verizon when a Verizon customer makes a call to an end user that Global NAPs itself, as opposed to Verizon, serves. In such cases, the calls get from a Verizon customer to a Global NAPs customer by means of Global NAPs' services and facilities. Global NAPs and Verizon have physically interconnected their communications networks in order to ensure that these calls are indeed completed.

The FCC has repeatedly ruled that calls made to ISPs are largely interstate in nature and, therefore, under the FCC's regulatory jurisdiction. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 F.C.C.R. 3689 (1999) (hereinafter, "*Reciprocal Compensation Order*"), *vacated on other grounds, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). When Verizon hands off a call to Global NAPs for Global NAPs to deliver to an ISP, therefore, Global NAPs is providing an interstate service to Verizon. The FCC has recently adopted rules governing the compensation to be paid to a carrier in Global NAPs' position in handling such interstate ISP-bound traffic. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 F.C.C.R. 9610 (2001) (hereinafter, "*ISP Remand Order*"). Prior to that ruling, however, the FCC—while acknowledging the interstate nature of the traffic—expressly announced that it had no specific rules governing intercarrier compensation for it. *See, e.g., Reciprocal Compensation Order*, 14 F.C.C.R. at 3690, 3695. To fill that void, Global NAPs filed its tariff, which became the subject of the FCC's orders below.

The Communications Act of 1934, codified at 47 U.S.C. §§ 151-614 (1991 & Supp. 2000), as amended (the "Act"), contains very specific statutory language dealing with the

obligations of carriers to offer their services at just and reasonable rates, pursuant to tariffs filed with the FCC. 47 U.S.C. § 203. Pet. App. at 62a-63a. The Act also gives the FCC several tools to ensure that carrier tariffs are, and remain, just and reasonable as required by 47 U.S.C. § 201(b). 47 U.S.C. §§ 203-205. Pet. App. at 62a-66a. These provisions govern the FCC's authority to review, revise, and suspend carrier tariffs if the FCC believes there is a question of the lawfulness of the tariff.

Under Section 204, the FCC may reject a carrier's filed tariff before it becomes effective. 47 U.S.C. § 204. Pet. App. at 64a-66a. Section 204 also allows the FCC to suspend a tariff, and either investigate it prior to its effective date or allow it to take effect subject to refund if the investigation shows it to be unreasonable. *Id.* Pet. App. at 64a-66a. Under Section 205, the FCC may investigate an already effective tariff and, if it finds any defects, order prospective changes. 47 U.S.C. § 205. Pet. App. at 66a.

Section 208 establishes a complaint procedure by which parties adversely affected by a tariff that violates the Act or the FCC's rules may obtain redress for the harm that they have suffered by virtue of the violation. 47 U.S.C. § 208. Pet. App. at 66a-67a. Under Section 208, the complainant must show that it has been damaged, directly or indirectly, by a carrier's actions, and is entitled to "reparations," or "damages," caused by those actions. *Id.* Pet. App. at 67a-68a.

Global NAPs and Verizon are physically interconnected to exchange traffic with each other in furtherance of Verizon's duty to interconnect its network with competitors, *see* 47 U.S.C. § 251(c)(2). Pet. App. at 70a. Verizon and Global NAPs each have a duty to pay the other for the work entailed in completing calls that each may send to the other. *See* 47 U.S.C. § 251(b)(5). Pet. App. at 69a. During the time period relevant to this case, however, (a) the FCC's rules required

such compensation only for "local" traffic, *see* 47 C.F.R. § 51.701(b) (2000) (later modified by the *ISP Remand Order*, 16 F.C.C.R. 9610 (2001)); and (b) the FCC had expressly ruled that ISP-bound calls were not "local" in nature. *See Reciprocal Compensation Order*, 14 F.C.C.R. at 3701-03. There is therefore no necessary conflict between Section 251(b)(5), calling for negotiated intercarrier compensation, and tariffing intercarrier arrangements for non-local ISP-bound calls.

That said, carriers under Sections 251 and 252 of the Act may agree to interconnection arrangements that go beyond those mandated by the law. *See* 47 U.S.C. § 252(a)(1). It is therefore possible, as the FCC has recognized, that an interconnection agreement might require compensation for ISP-bound calls even though the statute and the FCC's regulations do not require this result. *See Reciprocal Compensation Order*, 14 F.C.C.R. at 3690, 3703-04. Global NAPs addressed this possibility in its tariff by expressly stating that the tariff did not apply to traffic for which payment was received pursuant to an interconnection agreement. Pet. App. at 86a-88a.[1] In practical terms, Global NAPs' tariff was necessary because Global NAPs was completing hundreds of millions of minutes of traffic from Verizon to its ISP customers each month, but Verizon was not paying for this service, either under the parties' interconnection agreement or otherwise. To the contrary, Verizon was affirmatively arguing to state regulators and, later, in federal court that its interconnection agreement with Global NAPs did ***not*** require payment for such calls. In these circumstances, no conflict between the tariff and Global NAPs' actual interconnection agreement with Verizon was possible.

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[1] Only Section 7 of the Tariff, titled "Interconnection Service" has been reproduced at Appendix F to this Petition.

Global NAPs filed the tariff at issue here on April 14, 1999. Pet. App. at 44a (¶ 11). The FCC's rules provide that tariffs filed by non-dominant carriers (such as Global NAPs) take effect on only one day's notice. *See* 47 C.F.R. § 61.23(c), Pet. App. at 84a. The tariff therefore took effect on April 15, 1999. Pet. App. at 44a (¶ 11). The FCC took no action on its own after Global NAPs filed its tariff. As a result, the tariff took effect as a lawfully binding statement of the terms applicable to the service Global NAPs provides in completing jurisdictionally interstate ISP-bound calls.

On July 8, 1999, after the tariff had been in effect for almost two months (and after Global NAPs had begun to bill Verizon pursuant to the tariff), Verizon filed a formal complaint challenging the tariff under Section 208 of the Act. Global NAPs disputed all of Verizon's claims. On December 2, 1999, the FCC issued an order deciding the complaint in favor of Verizon and retroactively invalidating Global NAPs' tariff. Pet. App. at 36a-57a.

The FCC held that the tariff violated two of its rules. First, the FCC found that the tariff violated 47 C.F.R. § 61.74(a), which provides that a tariff may not contain a cross-reference to an external document. Pet. App. at 56a (¶ 24). It also found that the tariff violated 47 C.F.R. § 61.2, which provides that tariff terms must be clear and explicit. Pet. App. at 55a (¶ 22). The FCC did not cite any statutory provision as the basis for voiding the tariff, nor did it explain how its decision to void the tariff retroactively satisfied the stringent criteria laid out by this Court in *American Trucking*. This is significant, in part, because in a Section 208 case the normal, appropriate remedy is damages, such as a refund of overcharges. *See New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 F.C.C.R. 5128, ¶ 14 (2000) (citing *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980)).

Global NAPs requested that the FCC reconsider its decision and pointed out that the agency had violated the law, and this Court's precedent, by retroactively voiding the tariff. The Commission denied Global NAPs' request for reconsideration; in so doing it failed even to address Global NAPs' argument that the FCC lacked authority, under this Court's precedent, to retroactively invalidate the tariff as opposed to merely declaring it to be unlawful prospectively and awarding any appropriate "reparations" to Verizon. Pet. App. at 15a-35a.

On review in the D.C. Circuit, Global NAPs again argued that the FCC's action in retroactively voiding the tariff constituted a clear violation of this Court's decision in *American Trucking*. The D.C. Circuit upheld the FCC's decision to invalidate the tariff retroactively. Although it gave lip service to the requirements of *American Trucking*, the D.C. Circuit ignored the requirements of that precedent by sustaining retroactive invalidation of the tariff based on nothing more than the fact that the tariff conflicted with the FCC's rules. Pet. App. at 12a-14a. Neither the court below nor the agency has ever purported to explain how the tariff supposedly conflicts with a specific statutory mandate, as required by *American Trucking*.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari in this case because the D.C. Circuit decided an important question of federal law in a way that conflicts with relevant Supreme Court precedent. Specifically, the D.C. Circuit's decision is fundamentally at odds with this Court's decision in *American Trucking*.

The question in *American Trucking* was whether the Interstate Commerce Commission ("ICC") had implied authority to retroactively invalidate effective motor carrier tariffs. *American Trucking*, 367 U.S. at 360-61. Congress had recently passed the Motor Carrier Act of 1980, which

established specific guidelines under which motor carrier rate bureau agreements were entitled to antitrust immunity. The ICC released an interpretative rule explaining how it planned to implement and enforce the new statutory guidelines for rate bureau immunity. It noted the "lack of definite remedies for proven rate bureau violations" and announced that if a carrier committed a significant violation of a rate bureau agreement, the agency would, in addition to withdrawing the carrier's immunity, retroactively revoke its tariff. *Id.* at 357.

The Court first noted that retroactive invalidation of an effective tariff is a drastic remedy that "can have serious consequences" for the affected carrier. *Id.* at 358.[2] It then examined whether the Interstate Commerce Act expressly authorized the ICC to revoke an already-effective tariff and concluded that it did not. The ICC argued that Section 10762(e) of the Interstate Commerce Act (49 U.S.C. § 10762(e)), which authorized the agency to "reject" a tariff under certain circumstances, could be read to include express authority to revoke an effective tariff. The Court disagreed and noted that the ability to reject a tariff connotes a "refusal to receive at the threshold," which is more limited than the power to revoke a tariff the agency has already accepted. *American Trucking*, 367 U.S. at 362.

The Court also pointed out that rejection under Section 10762(e) was a peremptory action for which "the carrier's only recourse is to submit a corrected tariff." *Id.* at 363. In contrast, other provisions of the Interstate Commerce Act

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[2] Retroactive invalidation is particularly harsh on carriers relying on the effectiveness of a tariff. If the tariff is merely found to be unlawful for some reason, then the agency would then determine whether and to what extent the unlawfulness harmed the complainant; in the typical case, this would be the difference between the tariffed "legal" rate for a service and the (presumably, lower) "lawful" rate for that same service. But if the tariff is deemed void *ab initio*, then the affected carrier has no immediate means to get paid for its services ***at all***, much less get paid a "just and reasonable" rate for them.

authorized the ICC to take less drastic steps to remedy defects in an effective tariff while providing more procedural protections for the issuing carrier. "It would be bizarre, to say the least," the Court held, "to interpret § 10762(e) to give the Commission peremptory authority to void effective rates retroactively, when § 10704(b) places procedural constraints on the Commission's authority to take the less drastic step of modifying effective tariffs prospectively." *Id.*[3]

In addition, the Court noted that its own past rulings, as well as those of the ICC, supported a narrow interpretation of the agency's ability to nullify effective tariffs:

> In *Berwind-White Coal Mining Co. v. Chicago & Erie R. Co.*, 235 U.S. 371 (1914), and again in *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924), we stressed the importance of common carriers' being able to rely on effective tariffs on file with the Commission. As the Commission itself once recognized, these cases "strongly [suggest] that recovery for a tariff's failure to comply with a formal requirement may be limited to the amount of damage suffered by the shipper." . . . Reading § 10762(e) to authorize retroactive rejection of effective tariffs would significantly undermine the repose that carriers have traditionally been permitted to enjoy once their tariffs have been accepted by the Commission.

Id. at 363 n.7 (citation omitted).

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[3] The Court also held that reading Section 10762(e) to allow the ICC to revoke effective tariffs would undermine restraints placed by Congress on the agency's power to suspend a proposed tariff pending investigation. The ICC's power to suspend a tariff is limited to the seven month period after its proposed effective date, and the ICC can only take final action in a suspension-investigation proceeding after a full hearing. "Were we to read § 10762(e) as broadly as the Commission proposes," the Court held, "the temporal and procedural constraints of [the statutory suspension provision] would be nugatory, since the Commission could rely on its rejection powers to void a regulation at any time and without any procedural safeguards." *Id.*

After concluding that the relevant statutory sections did not explicitly authorize revocation of effective tariffs, the Court set out a clear, two-part test for when such authority should be implied as part of an agency's discretionary power. The Court held that, "[t]o lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria: first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate." *Id.* at 367.

In *American Trucking*, the Court concluded that the ICC had such authority because both prongs of the test were met. It held that Congress clearly intended for the ICC to play a key role in enforcing the antitrust immunity guidelines for rate bureaus under the Motor Carrier Act of 1980. *Id.* at 368. On the "more difficult" question whether the power to revoke tariffs is closely and directly tied to the statutory mandate of policing rate bureaus, the Court noted that the ICC had taken "significant steps" to ensure that revocation would not be imposed unfairly[4] and concluded that the new penalty was "directly aimed at ensuring that motor carriers comply with the guidelines established by Congress in the [Motor Carrier Act of 1980]." *Id.* at 370.

The FCC's retroactive invalidation of Global NAPs' tariff raises the same question decided by this Court in *American Trucking*—namely, the extent of the agency's implied authority to retroactively void an effective tariff. The Commission voided Global NAPs' tariff solely on the ground that it violated two FCC regulations.[5] The Communications

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[4] *Id.* at 369, 370. For instance, the Court noted that "[u]nder the Commission's proposed scheme, effective tariffs will be nullified only upon findings of substantial violations of rate-bureau agreements." *Id.* at 370.

[5] As noted above, the FCC found that Global NAPs' tariff violated 47 C.F.R. § 61.74(a), which provides that a tariff may not contain a cross reference to an extraneous document, and 47 C.F.R. § 61.2, which

Act, like the Interstate Commerce Act, does not expressly authorize the retroactive revocation of an effective tariff. Pet. App. at 62a-66a. Instead, the Communications Act prescribes very specific ways in which the FCC can ensure that carrier tariffs are just and reasonable. It provides that the FCC may, under some circumstances, "reject" a proposed tariff offered for filing, Pet. App. at 63a;[6] "suspend" a newly-filed tariff during a hearing on its lawfulness, Pet. App. at 64a-66a; and investigate an effective tariff and, again after a hearing on its lawfulness, prescribe a lawful rate "to be thereafter observed." Pet. App. at 66a. It also provides that common carriers may be liable for damages if they violate the Act. Pet. App. at 67a. As the Court found in *American Trucking*, it would be "bizarre" to read a peremptory revocation power into these provisions because they authorize ***less drastic*** (i.e., prospective) action by the agency and provide ***more*** procedural protection for the carrier.

In the absence of any express authority in the Communications Act, the FCC did not have implied authority to retroactively revoke Global NAPs' tariff unless the two-part test in *American Trucking* was met. In neither its initial order nor its order denying Global NAPs' petition for reconsideration did the FCC respond to this argument, discuss *American Trucking*, or provide any analysis of the scope of its implied authority to invalidate tariffs retroactively.

The court below compounded the FCC's error of ignoring or overlooking this Court's binding precedent. The court below purported to apply *American Trucking*, but in fact plainly disregarded it and established a new and unsupported

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requires that a tariff be clear and explicit. *See* Pet. App. at 56a, 55a (¶¶ 24, 22).

[6] As the Court noted in *American Trucking*, the authority to reject a tariff at the time it is filed is substantially more limited than the power to revoke an already-effective tariff. *See American Trucking*, 467 U.S. at 362.

standard for when an agency may void an effective tariff retroactively. The court held that:

> The FCC found that the tariff, on its face, violated the plain meaning of the FCC's tariff regulations and therefore was unlawful from the date of issuance. This is sufficient to satisfy the test laid out in *American Trucking Ass'ns* as the FCC voided a tariff in furtherance of a "specific statutory mandate" to which the action was "directly and closely tied."

Pet. App. at 13a.

The court thus concluded, in effect, that *American Trucking* is satisfied—and an agency has implied authority to invalidate a tariff retroactively—if the tariff conflicts with one or more of the agency's regulations. No conflict with any statute at all—much less any "specific statutory mandate"—need be identified.

This ruling simply cannot be squared with the Court's holding in *American Trucking*. Neither the D.C. Circuit nor the FCC ever identified any section of the Act that provides a "specific statutory mandate" the FCC would advance by retroactively voiding Global NAPs' tariff. In *American Trucking*, the Court noted that Congress had given the ICC new authority to police rate bureau agreements and that the implied power to nullify a carrier's tariff was a "justifiable adjunct" to that new authority. *American Trucking*, 467 U.S. at 370. Here, in contrast, there is no new (or even not-so-new) statutory program to support the view that Congress has given the FCC this radical new power to retroactively void effective tariffs.

Indeed, in revising the Communications Act in 1996, Congress reaffirmed the importance of the traditional tariffing requirements by adding a new Section 10 of the Act, 47 U.S.C. § 160, which provides specific procedures by which the Commission may dispense with the obligation of carriers to file and abide by tariffs for their interstate communications

services. This new section resolves more than a decade of controversy (including controversy that has reached this Court) about when and whether the FCC may permit or require carriers to offer their services without the benefit of tariffs. *See MCI Tel. Corp. v. American Tel. and Tel. Co.*, 512 U.S. 218 (1994) (dispute over scope of tariffing obligation and FCC's authority to modify or eliminate that obligation). With specific statutory procedures in place for the FCC to do away with the tariffing obligation, it would seem all the more important, to maintain fidelity to the congressional plan, for the FCC to identify a specific statutory mandate allowing it to retroactively void a carrier's lawfully filed tariff.

The holding below removes ***Congress*** from the *American Trucking* equation altogether. Under the D.C. Circuit's new rule, an agency does not have to show that Congress intended for it to have the implied power to void tariffs—it merely has to find that a tariff conflicts with one of its own regulations and on that basis alone retroactively declare the tariff a nullity. This, in turn, has the obvious effect of vastly expanding the agency's power to void tariffs retroactively.

The significance of this expansion of implied agency authority is magnified because the decision was rendered by the D.C. Circuit, which hears many appeals in cases involving agency rate regulation. The D.C. Circuit's decision undoubtedly will support the conclusion by other federal agencies, including the Federal Energy Regulatory Commission and the Surface Transportation Board, that they, too, have implied authority to nullify an effective tariff solely because it is inconsistent with an agency regulation. Even if a case could be made as a policy matter that *American Trucking* unnecessarily restricts federal agencies charged with overseeing tariffs, and that this Court's test for implying a power to revoke should be relaxed, no such case has in fact been made. Instead, the D.C. Circuit panel has effectively overruled *American Trucking* sub silentio.

CONCLUSION

For the foregoing reasons, Global NAPs respectfully requests that the Court grant this petition for writ of certiorari. Because the decision of the D.C. Circuit is in clear and direct conflict with controlling precedent of this Court, Global NAPs also submits that this case is appropriate for summary disposition pursuant to SUP. CT. R. 16.1 and requests that the Court summarily reverse the D.C. Circuit's decision. *See Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999) (summary reversal appropriate to correct lower court's "demonstrably erroneous application of federal law").

Respectfully submitted,

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September 27, 2001

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1136

GLOBAL NAPS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

VERIZON DELAWARE, INC., *et al.*,
Intervenors.

Argued, February 20, 2001
Decided, April 27, 2001

JUDGES: Before: WILLIAMS, SENTELLE and ROGERS, *Circuit Judges*. Opinion for the Court filed by Circuit Judge SENTELLE.

OPINION:

On Petition for Review of Orders of the Federal Communications Commission

SENTELLE, *Circuit Judge*:

Petitioner Global NAPs, Inc. ("GNAPs") seeks review of a Federal Communications Commission ("FCC") ruling that GNAPs' tariff for Internet-bound traffic was facially invalid under FCC regulations. GNAPs raises both procedural and substantive challenges to the FCC's order. Specifically,

GNAPs contends that the FCC violated its own rules and due process requirements in voiding the tariff, misconstrued the tariff terms, and improperly invalidated the tariff retroactively. We hold that the FCC did not deprive GNAPs of due process, did not exceed its authority by invalidating the tariff, and reasonably declared GNAPs' tariff unlawful. Therefore we uphold the FCC's order and deny the petition for review.

I. Background

A. Statutory & Regulatory Context

1. Reciprocal Compensation

Under Section 251(b) of the Telecommunications Act of 1996, local exchange carriers ("LECs") are required to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). This means that when a customer of Carrier X calls a customer of Carrier Y who is within the same local calling area, Carrier X pays Carrier Y for completing, or "terminating," the call. The FCC interprets this requirement to apply only to local calls—that is, calls that originate and terminate within a local area. The reciprocal compensation requirement "does not apply to the transport or termination of interstate or intrastate interexchange traffic." *In re Implementation of the Local Competition Provisions in the Telecom. Act of 1996*, 11 FCC Rcd 15,499, 16,013 ¶ 1034 (1996) (subsequent history omitted).

Under the Act, carriers are expected to negotiate the rate and terms of reciprocal compensation. If the carriers are unable to reach agreement, they may submit the contested issues to arbitration by the relevant state public utility commission ("PUC"). 47 U.S.C. § 252(e)(1). Once the PUC approves an interconnection agreement, it is charged with interpreting and enforcing the agreement, but the PUC's

determinations are subject to review in federal court for consistency with the Act. *See* 47 U.S.C. § 252(e)(6).

In February 1999, the FCC published an order holding that Internet-bound calls to Internet Service Providers ("ISPs") are not local on the theory that such traffic does not originate and terminate in the same local calling area, and is therefore not covered by the reciprocal compensation obligation. *See In re Implementation of the Local Competition Provisions in the Telecom. Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*Reciprocal Compensation Ruling*"). While the call to the ISP may be local, the FCC concluded that the terminating end of the call is actually the site reached by the Internet connection. The FCC noted that there was no federal rule governing intercarrier compensation for Internet-bound traffic, but held that carriers would be bound to provide compensation as provided under their respective interconnection agreements as interpreted by state PUCs. *Id.* at 3704 ¶ 24. The FCC also initiated a rulemaking on an appropriate federal inter-carrier compensation mechanism. *Id.* at 3707 ¶ 28. While this rulemaking was underway, the affected LECs petitioned this court for review of the FCC's decision. We vacated and remanded the order for the Commission's failure to provide an adequate explanation as to why Internet-bound calls were not treated as local calls. *See Bell Atlantic Tel. Cos. v. FCC*, 340 U.S. App. D.C. 328, 206 F.3d 1 (D.C. Cir. 2000).

2. Tariff Requirements

Under Section 201(b) of the Telecommunications Act, all interstate communications "charges, practices, classifications, and regulations" must be "just and reasonable." 47 U.S.C. § 201(b). Carriers must publish rate tariffs before they go into effect. Published tariffs "must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2 (a). Tariffs may not "make reference to any other tariff publication or to any other document or

instrument." *Id.* at § 61.74(a). Tariffs filed by nondominant carriers, such as GNAPs, take effect on only one day's notice. Such tariffs receive streamlined review and are presumed lawful by the Commission. Failure to comply with the relevant regulatory provisions "may be grounds for rejection" of the tariff. *Id.* at § 61.1(b).

B. Relevant Facts

GNAPs is a competitive local exchange carrier ("CLEC") in several states. GNAPs and Intervenor Verizon, an LEC formerly known as Bell Atlantic, have interconnection agreements in several states. In April 1997, the two carriers entered into an interconnection agreement including a provision that "[r]eciprocal compensation only applies to the transport and termination of Local Traffic" defined as "a call which is originated and terminated within a given [Local Access and Transport Area or "LATA"]" in Massachusetts. The parties did not agree as to whether the agreement's reciprocal compensation provisions covered Internet-bound traffic, but agreed to abide by the interpretation of the Massachusetts Department of Telecommunications and Energy ("DTE")—the Massachusetts PUC—of either the GNAPs-Verizon agreement or identical language in other agreements to which Verizon was a party.

On October 21, 1998, DTE ruled that Verizon was required to pay reciprocal compensation for the delivery of Internetbound traffic by MCI WorldCom. *Complaint of MCI World-Com, Inc.*, D.T.E. 97-116 (Mass. D.T.E. Oct. 21, 1998). At the time, DTE directed Verizon to pay reciprocal compensation to other LECs with which it had similar agreements within the state. Shortly thereafter, however, the FCC published the *Reciprocal Compensation Ruling* declaring that Internet-bound traffic is interstate, not local. DTE responded on May 19, 1999 by vacating its October decision and declaring that Verizon was not required to pay reciprocal compensation for Internet-bound traffic, but may be required

to pay compensation under the interconnection agreement. *Complaint of MCI WorldCom, Inc.*, D.T.E. 97-116-C (Mass. D.T.E. May 19, 1999). On February 25, 2000, after this Court vacated the FCC's order, DTE reaffirmed its May 1999 ruling, but this ruling is the subject of ongoing litigation. *Complaint of MCI WorldCom, Inc.*, D.T.E. 97-116-D (Mass. D.T.E. Feb. 25, 2000).

On April 14, 1999, while the DTE proceedings were underway (and before the DTE vacated its initial decision) GNAPs filed a tariff imposing an $0.008 per minute charge on the delivery of all Internet-bound calls for which GNAPs "does not receive compensation . . . under the terms of an interconnection agreement." The tariff further provided that a carrier's "[f]ailure . . . to actually compensate [GNAPs] for ISPbound traffic as local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate [GNAPs] under the terms of this Tariff." On May 27, 1999, GNAPs billed Verizon under this tariff over $1.7 million for fifteen days of service. Verizon refused to pay.

C. The FCC Proceedings

On July 8, 1999 Verizon filed a complaint against GNAPs' tariff under Section 208 of the Communications Act. Verizon alleged that 1) the tariff was inconsistent with FCC rules insofar as the FCC exempted ISPs from access charges and provided for joint provision of access service to inter-exchange carriers, 2) the tariff preempted state determination of intercarrier compensation for interstate Internet-bound traffic, 3) the tariff made Verizon an involuntary GNAPs customer, and 4) the tariff imposed excessive rates. Specifically, Verizon alleged "GNAPs has no right to circumvent the negotiation and arbitration process that the DTE and this Commission have directed it to follow by unilaterally filing a federal tariff." After a status conference, the FCC directed briefing on ten issues concerning the

legality of the tariff and the applicability of specific FCC rules, including "why Global NAPs filed a federal tariff and whether that was reasonable." *In re Bell Atlantic-Delaware, Inc.*, E-99-22 (Aug. 19, 1999).

On December 2, 1999, the FCC declared GNAPs' tariff unlawful under section 201(b) and *void ab initio*. *In re Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 12,946 (1999) ("*Order*"). The FCC found that the challenged tariff provisions violated the requirement of 47 C.F.R. § 61.2 that tariffs be "clear and explicit" because "those tariff provisions condition the imposition of charges on circumstances that were indeterminate when the tariff took effect and remain indeterminate today." *Id.* P 2. Additionally, the FCC found that the tariff impermissibly cross-referenced another document—in this case the interconnection agreement between GNAPs and Verizon—in violation of 47 C.F.R. § 61.74(a). The Commission noted that at the time the tariff was filed, the parties did not know whether GNAPs would receive reciprocal compensation from Verizon for Internet-bound traffic because the DTE proceedings were still underway.

On January 3, 2000, GNAPs petitioned for reconsideration of the FCC's order. GNAPs raised several arguments. First, GNAPs argued that in basing its decision on grounds not raised by Verizon or briefed by either party, the FCC denied GNAPs its right to notice and due process and illegally relieved Verizon of its burden of proof. GNAPs further argued that the FCC, by voiding the tariff retroactively, illegally denied GNAPs just compensation for the interstate services it provided to Verizon. Finally, GNAPs claimed that the FCC's order was wrong on the merits and the tariff was legal under the Act and applicable FCC regulations.

The FCC denied GNAPs' petition on March 22. *In re Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc., Order on Reconsideration*, 15 FCC Rcd 5,997 (2000)

("*Reconsideration Order*"). The FCC rejected GNAPs procedural claims, explaining that its initial *Order* was based on issues that were antecedent to those raised by Verizon's complaint, and therefore could be considered. The FCC further rejected GNAPs' contentions that the tariff was lawful and that GNAPs was due compensation for services rendered to Verizon.

On March 24, 2000, GNAPs petitioned for review of both orders.

II. Notice

Petitioner GNAPs contends the FCC violated both its own rules and GNAPs' due process rights by basing its ruling on legal arguments that were not presented by either party nor raised by the FCC in its August 1999 briefing order. According to GNAPs, only those issues pled to the Commission are properly before it. Therefore, GNAPs claims, the Commission was precluded from basing its decision on any other grounds. By doing otherwise, GNAPs claims the FCC violated its due process rights and the *Order* must be set aside.

The FCC's rules require that a petitioner plead "all matters concerning a claim . . . fully and with specificity." 47 C.F.R. § 1.720(a). As interpreted by the FCC, these rules bar a complainant from amending or otherwise "introducing new issues late in the development of the case." *In re Implementation of the Telecom. Act of 1996*, 12 FCC Rcd 22,497, 22,597 P 241 (1997). GNAPs claims that any departure from those rules violates GNAPs' due process rights. Specifically, GNAPs alleges that the FCC's conduct contradicts the Administrative Procedure Act's ("APA") requirement that a party "shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. § 554(b). *See Amoco Prod. Co. v. Fry*, 326 U.S. App. D.C. 211, 118 F.3d 812, 819 (D.C. Cir. 1997) ("Notice and a meaningful opportunity to challenge the

agency's decision are the essential elements of due process."). The lack of notice, GNAPs claims, made it impossible for it to respond to the arguments upon which the FCC ultimately made its decision. Proper notice, GNAPs claims, would have enabled it "to cut its losses early on by amending its tariff." Brief for Petitioner at 27.

The FCC responds to GNAPs' procedural claims by arguing that it voided GNAPs' tariff based on legal theories that were "antecedent" to those raised by Verizon. The FCC could not determine the reasonableness of the tariff without determining what it covered, and that question was indeterminate given the ongoing DTE proceedings. We agree. Though the precise legal theories relied upon by the Commission were different than those raised by Verizon, GNAPs cannot credibly argue that the effect of the ongoing state proceeding on GNAPs' tariff and Verizon's payment obligations was not squarely before the agency. GNAPs cites *Virginia State Corp. Comm'n v. MCI*, 14 FCC Rcd 4744 (1999), for the proposition that in a Section 208 proceeding, the FCC may only consider those issues briefed by the complainant. While the FCC declined to consider issues raised *sua sponte* by Commission staff in *Virginia State Corp.*, it was not because the Commission lacked the authority to do so. Rather, the FCC concluded that "[i]n the particular circumstances" of that case the unbriefed issues "raised difficult and important issues warranting extensive analysis by the parties and the Commission." *Id.* at 4753 ¶ 24 n.65. It was these "particular circumstances," and not the complainant's failure to raise particular issues standing alone, that would have deprived the parties "a full and fair opportunity" to address the issues. *Id.*

There is no dispute that the FCC declared GNAPs' tariff unlawful "for reasons other than those asserted" by Verizon. *Order* at P 14. This does not, however, mean that GNAPs was deprived due process. Even assuming that the FCC violated its own rules, GNAPs had adequate opportunity to

meet the charges on reconsideration. GNAPs addressed the substance of the FCC's findings in its petition for reconsideration (while claiming not to), and identified no significant evidence that might have changed the FCC's conclusions. Unless we are given concrete reason to believe otherwise, we will trust that an agency properly discharged its obligation to reconsider those issues presented in a petition for reconsideration; "we cannot consider the reconsideration to have been a sham." *U.S. Satellite Broad. Co. v. FCC*, 239 U.S. App. D.C. 74, 740 F.2d 1177, 1186 (D.C. Cir. 1984). We therefore proceed to review the merits of the FCC's decision.

III. Merits

A. Standard of Review

Under the APA, a reviewing court must uphold an FCC order unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This is a "deferential standard" that "presumes the validity of agency action." *Southwestern Bell Tel. Co. v. FCC*, 335 U.S. App. D.C. 44, 168 F.3d 1344, 1352 (D.C. Cir. 1999). The FCC is due substantial deference in its implementation of the Communications Act, and "even greater deference" when interpreting its own rules and regulations. *Capital Network Sys. v. FCC*, 307 U.S. App. D.C. 334, 28 F.3d 201, 206 (D.C. Cir. 1994). A similar standard applies to the FCC's interpretation of tariffs. Such interpretations should be upheld where they are "reasonable [and] based upon factors within the Commission's expertise." *American Message Centers v. FCC*, 311 U.S. App. D.C. 64, 50 F.3d 35, 39 (D.C. Cir. 1995) (citation omitted). Reversing an FCC tariff interpretation should only occur where it "is not supported by substantial evidence, or the [Commission] has made a clear error in judgment." *Id.* (citation omitted).

B. The Tariff

The FCC found GNAPs' tariff to be ambiguous and to contain an impermissible cross-reference. Either is a sufficient ground to declare the tariff illegal. GNAPs maintains that a proper reading of its tariff shows that it is not ambiguous and does not contain an impermissible cross-reference. Whereas the FCC and Verizon contend that the tariff is conditional on another document—the referenced interconnection agreement—GNAPs maintains that the tariff is conditional on whether GNAPs was actually paid for carrying the traffic, irrespective of the reason. GNAPs claims the tariff is not unclear or ambiguous, as carriers will know whether they paid GNAPs and therefore will know whether the tariff applies. For the same reason, GNAPs claims, the tariff should not be read to contain an impermissible cross-reference in violation of 47 C.F.R. § 61.74(a).

The FCC clearly has the better of this argument. 47 C.F.R. § 61.74(a) provides that "no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument." The relevant portion of the tariff reads: "This tariff applies to all ISP-bound traffic for which [GNAPs] does not receive compensation from the Delivering LEC *under the terms of an interconnection agreement*." (Emphasis added.) From these words it is unmistakable that the application of the tariff is contingent upon whether GNAPs is paid "under the terms of an interconnection agreement." If GNAPs receives payment for some other reason, this would not satisfy the condition, and payment would still be due under the tariff. The tariff, on its face, violates the FCC's rule. Any reasonable construction of the tariff's language would require a customer to consult the interconnection agreement to determine whether the tariff applied.

The FCC also reasonably concluded that the tariff violates 47 C.F.R. § 61.2(a) which provides that tariffs must be clear

and explicit "[i]n order to remove all doubt as to their proper application." When GNAPs filed the tariff, the DTE proceedings were still underway. As a result, it remained unclear whether the GNAPs-Verizon interconnection agreement required compensation for Internet-bound traffic. If a party could not know whether compensation was due under the agreement, it could not know whether any payment to GNAPs was "under the terms of an interconnection agreement." If a party could not reasonably ascertain the "proper application" of the tariff at the time it was filed, the tariff was unclear and therefore was invalid.

DTE's subsequent dismissal of GNAPs' claim for compensation under the agreement did not "cure" its ambiguity for several reasons. First, the FCC's *Order* focused on whether the tariff was valid *at the time it was filed*. GNAPs revised its tariff on February 14, 2000, eliminating the provisions found unlawful by the FCC. DTE's subsequent ruling could not retroactively cure the deficiency of the tariff in effect prior to February 14 or affect the validity of charges GNAPs sought to assess Verizon prior to that point. In addition, because GNAPs appealed the DTE finding, that matter was not resolved when the FCC made its determination. Finally, even had the DTE ruling cured the tariff's indeterminacy, it did not eliminate the impermissible cross-reference.

C. Statutory Structure

In a final effort to avoid the inevitable, GNAPs argues that the FCC does not have the authority to invalidate tariffs under Section 208, but only acts as an "adjudicator of private rights." *AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992). In GNAPs' view, it would be proper for the FCC to award damages to one party or another, but not to declare a tariff unlawful on its face. Challenges to tariffs themselves, GNAPs claims, must proceed under Sections 204 and 205, which relate to modifying or invalidating tariffs.

This argument is no more successful than GNAPs' creative reading of its own tariff. As we noted just last year, Section 204 grants the FCC "quasi-legislative authority to evaluate a carrier's proposals for new or revised rates." *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 786 (D.C. Cir. 2000). Section 208, on the other hand, grants "authority, upon complaint by an injured party, to adjudicate the lawfulness of a carrier's past and present rates and practices." *Id.* It is difficult to conceive of this case as other than an adjudication of "the lawfulness of a carrier's . . . present rates and practices."

D. Relief

GNAPs argues, in the alternative, that even if the FCC was correct to declare the tariff unlawful, the FCC erred by "retroactively invalidating" the tariff. Whatever the deficiencies of the tariff in this case, GNAPs argues, it is not so deficient as to justify retroactive invalidation under the standards set forth in *ICC v. American Trucking Assn's*, 467 U.S. 354, 104 S. Ct. 2458, 81 L. Ed. 2d 282 (1984). The retroactive invalidation is not, in GNAPs' view, "legitimate, reasonable, and directly adjunct to the Commission's explicit statutory power." *Id.* at 365 (internal quotation omitted). While acknowledging that the FCC has the authority to order a complete refund of tariff overcharges, GNAPs argues that the Commission must consider the equities before ordering such a result. *See Virgin Islands Tel. Co. v. FCC*, 300 U.S. App. D.C. 359, 989 F.2d 1231, 1240 (D.C. Cir. 1993); *Las Cruces TV Cable v. FCC*, 207 U.S. App. D.C. 116, 645 F.2d 1041, 1047-48 (D.C. Cir. 1981). Not only did the FCC not award GNAPs any compensation, but it did not even bother to consider whether to exercise its discretion. Thus, even if the Court sides with the FCC on the merits, GNAPs argues that a remand is necessary for the FCC to consider whether payment to GNAPs for services rendered is due.

GNAPs' argument that relief under Section 208 of the Act cannot be retroactive in effect is clearly wrong. Section 208 is designed to enable parties to obtain redress for a carrier's violation of the Act or the FCC's regulations. Yet insofar as Section 208 authorizes the award of damages or other remedies, it is always "retroactive" in its application in that it will always be changing the economic consequences of a carrier's prior conduct. The remedy here—complete invalidation of GNAPs' tariff—may be more severe than consequential damages, but it is no more backward-looking.

The FCC notes that it may be inappropriate for GNAPs to have filed its tariff in the first place. The FCC has not authorized, let alone required, carriers to file tariffs for local Internet-bound traffic. Instead, the Commission expected carriers to enter into interconnnection agreements that would set compensation subject to state commission approval. Merely because a tariff is presumed lawful upon filing does not mean that it is lawful. Such tariffs still must comply with the applicable statutory and regulatory requirements. Those that do not may be declared invalid. Indeed, GNAPs acknowledges that "[a] tariff that is so plainly defective as to be a legal nullity may be declared retroactively invalid—*void ab initio*—in order to ensure that an injustice is not worked on the affected customers." Brief for Petitioner at 36. That was the case here. The FCC found that the tariff, on its face, violated the plain meaning of the FCC's tariff regulations and therefore was unlawful from the date of issuance. This is sufficient to satisfy the test laid out in *American Trucking Ass'ns* as the FCC voided a tariff in furtherance of a "specific statutory mandate" to which the action was "directly and closely tied." 467 U.S. at 367, 104 S. Ct. 2458. The other cases cited by GNAPs—*Virgin Islands Tel. Co.* and *Las Cruces TV Cable*—are distinguishable, as they involved refunds for unreasonable rates, and not a patently unlawful tariff.

While we uphold the FCC's conclusion that the tariff was *void ab initio* and invalid from the date it was published, we have not left GNAPs without opportunity to seek redress. Our holding today does not foreclose GNAPs' ability to seek compensation under the interconnection agreement before the DTE as well as to seek a negotiated compensation settlement with Verizon. If this route is unsuccessful or impractical, and the FCC's rules make it difficult for GNAPs and other carriers to obtain compensation for Internet-bound traffic, they may petition the FCC for a change in the Commission's rules. That GNAPs sought to game the existing rules, and lost, does not mean the FCC was arbitrary and capricious in its application of its own rules.

IV. Conclusion

For the foregoing reasons, the petition for review is

Denied.

APPENDIX B

In the Matter of BELL ATLANTIC-DELAWARE, INC., BELL ATLANTIC-MARYLAND, INC., BELL ATLANTIC-NEW JERSEY, INC., BELL ATLANTIC-PENNSYLVANIA, INC., BELL ATLANTIC-VIRGINIA, INC., BELL ATLANTIC-WASHINGTON, D.C., INC., BELL ATLANTIC-WEST VIRGINIA, INC., NEW YORK TELEPHONE COMPANY, and NEW ENGLAND TELEPHONE and TELEGRAPH COMPANY,

Complainants,

v.

GLOBAL NAPS, INC.,

Defendant.

File No. E-99-22-R

FEDERAL COMMUNICATIONS COMMISSION

RELEASE-NUMBER: FCC 00-107

Adopted March 17, 2000; March 22, 2000 Released

ACTION: ORDER ON RECONSIDERATION

JUDGES:
By the Commission

OPINION:

I. INTRODUCTION

1. In this Order, we deny a petition filed by Global NAPs, Inc. (Global NAPs) [1] seeking reconsideration of our order [2]

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[1] *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Petition for Reconsideration, File No. E-99-22-R (filed January 3, 2000) (*Global NAPs Petition*). *See* 47 U.S.C. § 405(b)(1); 47 C.F.R. § 1.106.

granting a formal complaint brought by various Bell Atlantic companies (collectively, Bell Atlantic) against Global NAPs pursuant to section 208 of the Communications Act of 1934, as amended (Act).[3] For the reasons discussed below, we conclude that, in the *Order*: (1) the Commission did not violate the Communications Act, the Administrative Procedure Act (APA), the Due Process Clause, or its burden of proof rules by basing its decision on legal theories not raised by Bell Atlantic; and (2) the Commission did not err in ruling that, as of their filing date, Sections 7 and 7A of Global NAPs' F.C.C. Tariff No. 1 (Tariff) violated section 201(b) of the Act [4] and provided no basis for Global NAPs to collect compensation for its "ISP Traffic Delivery Service."[5]

II. BACKGROUND

2. The parties do not dispute the underlying facts that led to the filing of Bell Atlantic's complaint.[6] In addition, neither

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[2] *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Memorandum Opinion and Order, FCC 99-381, File No. E-99-22 (rel. Dec. 2, 1999) (*Order*).

[3] 47 U.S.C. § 208.

[4] 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such [interstate] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared to be unlawful. . . .").

[5] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1 (effective April 15, 1999) (Global NAPs Tariff or Tariff).

[6] *See, e.g., Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Answer, File No. E-99-22 (filed July 28, 1999) (*Global NAPs Answer*) at 1-2 ("The relevant facts in this case are few in number and not fundamentally in dispute. . . . What *is* in dispute is the legal and economic consequences of these facts.") at 6 ("Bell Atlantic's complaint is not fundamentally fact-based. To the contrary, Bell Atlantic challenges Global NAPs' legal right to file *any* tariff governing the interstate traffic at issue here at all."); *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*,

party challenges any finding of fact in the *Order*. Therefore, this Order incorporates by reference the facts described in the *Order*.[7]

3. In the *Order*, we agreed with Bell Atlantic that the challenged provisions of Global NAPs' Tariff violated section 201(b) of the Act. We concluded that, as of their filing date, Sections 7 and 7A of Global NAPs' Tariff were unlawful in two respects. First, we found that the challenged Tariff provisions were not "clear and explicit," as required by section 61.2 of our rules,[8] because "those provisions condition the imposition of charges on circumstances that were indeterminate when the Tariff took effect and remain indeterminate today." Specifically, the challenged Tariff provisions purported to apply only to ISP-bound traffic for which Global NAPs received no compensation from Bell Atlantic under the parties' existing interconnection agreement.[9] In this instance, the parties had executed an interconnection agreement despite an acknowledged failure to agree on the meaning of the inter-carrier compensation provisions in that agreement. The parties left that issue to the Massachusetts Department of Telecommunications and Energy (DTE). When Global NAPs filed its Tariff, the Massachusetts DTE had not yet reached a final determination regarding whether and how the parties' existing interconnection agreement provided for inter-carrier

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Global NAPs Brief on Non-Cost Issues, File No. E-99-22 (filed Sept. 2, 1999) at 1 (*Global NAPs Non-Cost Brief*) ("[A]t bottom the matter is simple. . . . The question raised by Bell Atlantic's complaint, then, is whether the tariff meets the general 'just and reasonable' standard of Section 201(b).").

[7] *See Order* at paras. 3-14.

[8] 47 C.F.R. § 61.2.

[9] "ISP-bound" traffic consists of calls originated by Bell Atlantic customers that are handed off to Global NAPs for delivery to Internet service providers (ISPs).

compensation for ISP-bound traffic. Thus, the parties did not know at the time the Tariff provisions were filed whether Global NAPs would receive such compensation from Bell Atlantic pursuant to their existing interconnection agreement. As a result, we concluded that the parties were also unable to determine whether Bell Atlantic was incurring charges under these Tariff provisions.[10] Accordingly, we concluded that "Global NAPs cannot reasonably bill Bell Atlantic under this [T]ariff when the very applicability of the [T]ariff has yet to be determined."[11]

4. Second, we found that Global NAPs' Tariff was not self-contained, but rather impermissibly cross-referenced an external document (*i.e.*, an interconnection agreement), in violation of section 61.74(a) of our rules. Section 61.74 of our rules provides that, in the absence of a waiver, "no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument."[12]

5. In its Petition for Reconsideration, Global NAPs argues that the *Order* is flawed in several ways. First, Global NAPs claims that the *Order* breached Global NAPs' right to notice and an opportunity to be heard under the Communications Act, the APA, and the Due Process Clause, because the Commission based its decision on legal theories not raised by Bell Atlantic or briefed by Global NAPs.[13] Second, Global NAPs asserts that the *Order* illegally relieved Bell Atlantic of its burden of proof, because the *Order* relies on grounds as to

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[10] *Order* at paras. 2, 16-23.

[11] *Order* at para. 21.

[12] 47 C.F.R. § 61.74(a). *See Order* at paras. 2, 24.

[13] Global NAPs *Petition* at Summary, 5-10; *In the Matter of Bell Atlantic-Delaware, Inc., et al. v.* Global NAPs, *Inc.*, Reply in Support of Petition for Reconsideration, File No. E-99-22-R 9 (filed January 21, 2000) (*Global NAPs Reply*) at 4-9.

which Bell Atlantic allegedly presented no argument or evidence.[14] Third, Global NAPs argues that the *Order* violates the Communications Act, the APA, and the 5th Amendment by retroactively setting aside its Tariff and thereby depriving Global NAPs of any compensation for the interstate services it provided to Bell Atlantic.[15] Finally, Global NAPs claims that the two grounds on which the *Order* relies are not valid bases for invalidating the Tariff.[16] For the reasons discussed below, we reject all of Global NAPs' arguments and deny its petition for reconsideration.

III. DISCUSSION

A. The Commission Has Not Violated Global NAPs' Right to Notice and Opportunity to be Heard.

6. Global NAPs argues that the *Order* is procedurally defective under the Communications Act, the APA, and the Due Process Clause, because "it relies on matters as to which Global NAPs received no notice and which the Complainant did not plead or prove."[17] It is instructive, in analyzing this argument, to consider how courts address these same circumstances. It is well settled that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."[18] It is, therefore,

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[14] *Global NAPs Petition* at Summary, 11-16; *Global NAPs Reply* at 1.

[15] *Global NAPs Petition* at Summary, 7, 12-15; *Global NAPs Reply* at 1, 6-7, 9-10.

[16] *Global NAPs Petition* at Summary, 17-23; *Global NAPs Reply* at 1.

[17] *Global NAPs Petition* at 24.

[18] *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991). *See, e.g., United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446-48 (1993) (same as *Kamen*);

within a court's discretion to consider an argument not raised by the parties if the court finds that consideration of the argument is necessary in order to decide the case correctly.[19] As the Seventh Circuit Court of Appeals has explained:

> [L]itigants' failure to address the legal question from the right perspective does not render us powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances.[20]

7. We believe that the same is true for the Commission in its interpretation and application of the Communications Act and governing regulations. The Act repeatedly affords the Commission broad discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[21] Indeed, with respect to common carrier complaint proceedings, the Act expressly

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Arcadia v. Ohio Power Company, 498 U.S. 73, 77 (1990) (deciding the case on a question "antecedent" to those raised by the parties "and ultimately dispositive of the present dispute").

[19] *See, e.g., United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446-48 (1993); *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991); *Arcadia v. Ohio Power Company*, 498 U.S. 73, 77 (1990); *United States v. Dickerson*, 166 F.3d 667, 682, & 682 n.17 (4th Cir.), *cert. granted*, 120 S.Ct 578 (1999) ("Even where the parties abdicate their responsibility to call relevant authority to the Court's attention, . . . they cannot prevent us from deciding the case under the governing law. . . .") ("This Court may, in its discretion, consider issues not raised below. . . . Without question, we are free to address ourselves to any legal theory that would bear on this issue under appeal."); *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1529 (10th Cir. 1996) ("We conclude, for reasons other than those urged by Mr. Compton [the appellee], the district court erred. . . .")

[20] *Williams-Guice v. Board of Education*, 45 F.3d 161, 164 (7th Cir. 1995).

[21] 47 U.S.C. § 154(j). *See also* 47 U.S.C. §§ 154(i), 303(r).

provides the Commission with broad discretion "to investigate the matters complained of*in such manner and by such means as it shall deem proper.*"[22] This discretion encompasses the ability to consider an argument not raised by the parties if doing so is necessary to decide a case correctly.

8. In investigating the underlying complaint, we found questions arising under section 201(b) of the Act that were antecedent to those presented by Bell Atlantic and ultimately dispositive of the dispute. This finding triggered our overriding obligation to serve the public interest by interpreting, applying, and enforcing the Act *correctly*, not merely in some manner suggested by the litigants. Our adjudication of cases generates precedents and clarifies the law, providing benefits to the public at large. This crucial function would be unduly constricted were we blindly and without exception to defer to the parties' presentation of legal theories. Accordingly, where, as here, (1) the determinative facts are on the record and undisputed;[23] (2) the complainant does raise the statutory basis on which we rule in its favor (here, section 201(b) of the Act); (3) the undisputed facts and the record as a whole plainly reveal a violation of the law; and (4) the Act requires the Commission to adjudicate the complaint within five months,[24] we have discretion under sections 4(i), 4(j), 208(a), and 303(r) of the Act, and under the case authority described above, to decide an adjudication on a legal theory not articulated by the parties.

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[22] 47 U.S.C. § 208(a) (emphasis added).

[23] *See, e.g., Global NAPs Answer* at 1-2, 6; *Global NAPs Non-Cost Brief* at 1.

[24] *Cf. Hercules Inc. v. Environmental Protection Agency*, 598 F.2d 91, 129 (D.C. Cir. 1978) (acknowledging that a statutory deadline may require an administrative agency to follow relatively streamlined procedures).

9. The three Ninth Circuit cases on *which* Global NAPs belatedly relies do not undermine our conclusion.[25] Those cases simply hold that a party in an administrative adjudication should have notice of the contested issue and opportunity to present evidence relevant thereto. Here, Global NAPs did have notice of the core issue—whether its Tariff violated section 201(b) of the Act—and the relevant evidence was on the record and undisputed;[26] therefore, the *Order* is consistent with those cases. We do not believe that those cases can be read to hold that an agency may never decide an adjudication on a legal theory not articulated by the parties.

10. Global NAPs asserts for the first time in its Reply Brief that, had it known that the Commission was considering the particular legal theories on which the *Order* ultimately relied, it "*might* have introduced additional or different facts from those actually introduced, and *might* have sought discovery from Bell Atlantic on certain issues."[27] With but one minor and irrelevant exception,[28] however, Global NAPs fails to specify a single new fact or discovery request that it would have proffered. Moreover, as even Global NAPs acknowledges,[29] Bell Atlantic's complaint raised legal

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[25] *Andriasian v. Immigration and Naturalization Service*, 180 F.3d 1033 (9th Cir. 1999); *Department of Education of the State of California v. Bennett*, 864 F.2d 655 (9th Cir. 1988); *National Steel & Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 616 F.2d 420 (9th Cir. 1980). Global NAPs cited these cases for the first time in its *Reply*.

[26] *See, e.g., Global NAPs Answer* at 1-2, 6; *Global NAPs Non-Cost Brief* at 1.

[27] Global NAPs *Reply* at 9 (emphases added).

[28] The lone exception concerns Global NAPs' alleged "policy" regarding "bill and keep" arrangements, which we discuss in Section III (D)(1), *infra*.

[29] *See, e.g., Global NAPs Answer* at 1-2, 6; *Global NAPs Non-Cost Brief* at 1.

issues, not factual issues. Accordingly, on all of the bases described above, we reject the contention that the *Order* violated Global NAPs' procedural rights by relying on legal theories not specifically raised or briefed by either party.[30]

B. The Commission Has Not Violated Its Burden of Proof Rules.

11. According to Global NAPs, our rules regarding the burden of proof in complaint proceedings under section 208 of the Act require that "any claim as to which Bell Atlantic did not present evidence or argument is a claim on which Global NAPs wins."[31] Global NAPs asserts, therefore, that the *Order* "illegally relieved Bell Atlantic of its burden of proof" by basing its decision on claims as to which Bell Atlantic did not present evidence or argument.[32]

12. Global NAPs is correct that Bell Atlantic bore the burden of proof. Global NAPs is incorrect, however, that Bell Atlantic failed to present any evidence to satisfy that burden.

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[30] We note that the reconsideration phase of this proceeding afforded Global NAPs ample opportunity to rebut our legal reasoning in the *Order*, but Global NAPs expressly eschewed that opportunity. *See Global NAPs Petition* at Summary, 17; *Global NAPs Reply* at 2, 6 n.8, 9. *Cf. Petition by Texas Instruments for a Waiver of § 15.4(m) and § 15.7 of FCC Rules*, Order Denying Reconsideration, 78 F.C.C. 2d 364, 370-71 at paras. 22-24 (1980) (and cases cited therein) (noting that a party's failure to take full advantage of the argument opportunity presented by reconsideration undercut the party's argument that it was prejudiced by the proceedings that preceded reconsideration).

[31] *Global NAPs Petition* at 11-16, *citing High Tech Furnace Sys. v. Sprint Comm. Company*, 14 FCC Rcd 8040, 8044 at para. 10 (1999); *IT&E Overseas, Inc. v. Micronesian Telecommunications Corporation*, 13 FCC Rcd 16058, 16061-2 at para. 5 (1998); *Maydak v. AT&T Comm'ns*, 14 FCC Rcd 6680, 6681-2, 6683-4 at paras. 3, 8 (Comm. Car. Bur. 1999); *Krauss v. MCI Telecommunications Corporation*, 14 FCC Rcd 2770, 2776 at para. 11 (Comm. Car. Bur. 1999); *Global NAPs Reply* at 1.

[32] *Global NAPs Petition* at 11. *See also Global NAPs Reply* at 1, 4.

Quite the contrary. Bell Atlantic developed a record of undisputed facts and public documents (*e.g.*, Global NAPs' Tariff and Massachusetts DTE decisions) that, on their face, revealed a violation of section 201(b) of the Communications Act.[33] This record amply met Bell Atlantic's burden of producing a preponderance of favorable evidence, regardless of whether Bell Atlantic articulated the precise legal rationale on which we ultimately relied. Accordingly, we reject Global NAPs' contention that the *Order* violated our rules regarding burden of proof.

C. The Commission Did Not Err in Holding Global NAPs' Tariff Unlawful as of Its Filing Date.

13. Global NAPs contends that, under the Communications Act, the APA, and the Fifth Amendment, the Commission improperly invalidated Global NAPs' Tariff as of its filing date, without also determining some reasonable rate to be paid by Bell Atlantic.[34] In particular, "Global NAPs submits that it is unjust and unreasonable—more specifically, a form of confiscation—to retroactively relieve Bell Atlantic of any obligation to pay anything at all for the work Global NAPs does in delivering jurisdictionally interstate ISP-bound traffic at Bell Atlantic's request."[35]

14. Our *Order* has not eliminated Global NAPs' opportunity to obtain compensation for its delivery of Bell Atlantic-originated, ISP-bound traffic. Global NAPs had (and still has) an ample opportunity to obtain such compensation outside the context of the Tariff. First, under sections 251 and 252 of the Act, Global NAPs could have reached a mutually acceptable resolution with Bell Atlantic regarding inter-carrier

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[33] *See* 47 U.S.C. § 201(b). *See also* 47 C.F.R. §§ 61.2, 61.74(a).

[34] *Global NAPs Petition* at Summary, 7, 12-15; *Global NAPs Reply* at 1, 6-7, 9-10.

[35] *Global NAPs Petition* at 13.

compensation for ISP-bound traffic *before* executing an interconnection agreement with, and accepting traffic from, Bell Atlantic. Instead, Global NAPs consciously chose to execute the interconnection agreement and deliver traffic without such a "meeting of the minds," and deliberately opted to have the issue resolved through the arbitration processes under section 252 and/or the complaint processes of the Massachusetts DTE. Having freely chosen to (1) forego the certainty of compensation through a jointly acknowledged agreement with Bell Atlantic, and (2) litigate the compensation issue with the Massachusetts DTE, Global NAPs cannot be heard now to complain that it is somehow "unfair" to disallow compensation under the entirely separate, and mutually exclusive, tariff process. As the *Order* observes, "using the tariff process to circumvent the section 251 and 252 processes cannot be allowed."[36]

15. Moreover, Global NAPs has, in fact, obtained the right to receive compensation for the delivery of ISP-bound traffic via the non-tariff processes described above: Bell Atlantic must pay an amount equal to the contract's recipro cal compensation rate applied to the traffic not in excess of a 2:1 terminating-to-originating ratio.[37] Furthermore, the Massachusetts DTE has afforded Global NAPs the opportunity to try to obtain more compensation Than that—even retroactively—pursuant to additional

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[36] *Order* at para. 23.

[37] *Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts*, Order, D.T.E. 97-116-C (Mass. D.T.E. rel. May 19, 1999) at 28 n.31, 41 (*Massachusetts DTE May 19, 1999 Order*); *Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Complaint of Global NAPs, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts*, Order Denying Motions for Reconsideration and Dismissing Global NAPs Complaint, D.T.E. 97-116-D, 99-39 (Mass. D.T.E. rel. February 25, 2000) at 16 n.11 (*Massachusetts DTE February 25, 2000 Order*).

negotiation/mediation/arbitration under section 252 of the Act.[38] Indeed, two other carriers have already negotiated amendments to their interconnection agreements with Bell Atlantic that provide for such retroactive compensation,[39] and Global NAPs could, at a minimum, opt into one of those agreements pursuant to section 252(i) of the Act.[40] Finally, when the Tariff was filed, the Tariff's terms did not permit the parties to determine whether the Tariff imposed charges on Bell Atlantic for the delivery of ISP-bound traffic, rendering a fundamental aspect of the Tariff ambiguous.[41] Therefore, for all of these reasons, the *Order*'s preclusion of any compensation under the Tariff for the delivery of ISP-bound traffic does not confiscate Global NAPs' property or otherwise treat Global NAPs unfairly.

D. The Commission Did Not Err In Concluding That The Challenged Tariff Provisions Are Unlawful.

1. The Tariff is Indeterminate.

16. Global NAPs disagrees with the Commission's conclusion that, based on the language of Tariff Section 7A.1, a carrier that interconnects with Global NAPs cannot determine if the tariffed charges apply until the resolution of any underlying dispute regarding whether the interconnection agreement requires inter-carrier compensation for ISP-bound traffic. Specifically, Global NAPs contends that its "Tariff is quite clear that the key triggering event is whether or not

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[38] *See* Section III (E), *infra.*

[39] *See Massachusetts DTE February 25, 2000 Order* at 19 n.13.

[40] 47 U.S.C. § 252(i) ("A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.").

[41] *See* Section III (D)(1), *infra.*

compensation for [ISP-bound] traffic is paid by the connected LEC."[42] Global NAPs further contends, therefore, that "whether there is a dispute about whether such compensation is or is not due under an interconnection agreement is immaterial."[43]

17. The applicability of Global NAPs' tariffed rates for "ISP Traffic Delivery Service" hinges on Section 7A.1 of the Tariff, which provides, in pertinent part:

> This tariff applies to all ISP-bound traffic for which the Company does not receive compensation from the Delivering LEC *under the terms of an interconnection agreement*. . . .[44]

Global NAPs' argument—that the Tariff's applicability turns solely on whether a carrier pays Global NAPs, and not also on whether an interconnection agreement requires a carrier to pay Global NAPs-ignores the portion of the Tariff emphasized above. Reading the pertinent provision as a whole reveals that the Tariff can only apply when the terms of an interconnection agreement do not mandate a carrier to pay Global NAPs for the delivery of ISP-bound traffic. Indeed, Global NAPs essentially acknowledges as much by stating repeatedly that the Tariff (1) "defers" to the negotiation/arbitration processes established by sections 251 and 252 of the Act;[45] (2) "is by its terms subject to

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[42] *Global NAPs Petition* at 17.

[43] *Global NAPs Petition* at 17-18. *See id.* at 22-23; *Global NAPs Reply* at 4.

[44] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1 (effective April 15, 1999) (Global NAPs Tariff) (emphasis added).

[45] *Global NAPs Non-Cost Brief* at 23-24, 46; *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc.*, Global NAPs Reply Brief on Non-Cost Issues, E-99-22 (filed Sept. 15, 1999) at 5, 23-34 (*Global NAPs Non-Cost Reply Brief*).

state commission rulings establishing compensation arrangements;"[46] and (3) "establishes a compensation obligation that applies *if an interconnection agreement does not. . . .*"[47] Those statements by Global NAPs are true only if Tariff Section 7A.1 is construed to mean that, if a dispute about inter-carrier compensation for ISP-bound traffic arises during the section 251/252 process, the Tariff does *not* apply until a state commission rules that the interconnection agreement does *not* establish such compensation.

18. To illustrate, as we read Section 7A.1 of the Tariff, if a carrier does not pay Global NAPs for the delivery of ISP-bound traffic, and the interconnection agreement does not require such payment, then Global NAPs' "remedy" is to impose charges pursuant to the Tariff; on the other hand, if a carrier does not pay Global NAPs for the delivery of ISP-bound traffic, and the interconnection agreement *does* require such payment, the appropriate remedy is to sue to enforce Global NAPs' right to "receive compensation from the Delivering LEC under the terms of an interconnection agreement."[48] For another illustration, Global NAPs claims that, if an interconnecting carrier does not actually pay compensation, then the Tariff applies-even if a state commission subsequently decides that some compensation must be paid under the interconnection agreement. If that is true, then the Tariff allows double-charging for the same service-once under the Tariff and later under the interconnection agreement—and the Tariff would then clearly be unreasonable. If the Tariff does not allow double-charging, then its application must depend on a preceding determination that the interconnection agreement does not require compensation. Thus, contrary to Global NAPs' contention, a

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[46] *Global NAPs Non-Cost Brief* at 5.

[47] *Global NAPS Non-Cost Reply Brief* at 23 (emphasis added).

[48] Global NAPs Tariff, Section 7A.1.

carrier cannot simply consult its checkbook to determine whether charges will accrue under the Tariff; a carrier must also know what the terms of its interconnection agreement with Global NAPs require.

19. The Commission also noted in the *Order* a concern that the Tariff provisions would conflict with any "bill and keep" arrangement in an interconnection agreement.[49] Global NAPs raises a number of objections to this statement, all essentially asserting that this concern is merely a hypothetical one, none of which we find persuasive. First, Global NAPs argues that it has no such agreements with any LEC and "has a policy of rejecting such agreements."[50] Yet, as noted above, Global NAPs entered into its agreement with Bell Atlantic without reaching consensus on what traffic was covered by the reciprocal compensation provisions. Thus, it is not clear what Global NAPs has agreed to. Global NAPs argues further that if it did agree to a bill and keep provision in the future, any such problem with the Tariff could be resolved by inserting provisions into the interconnection agreement about how to apply the Tariff provisions.[51] Speculation about what might be contained in future interconnection agreements, however, cannot make the current Tariff language sufficiently definite to comply with section 201 of the Act.

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[49] "[I]t is certainly possible that parties could have addressed ISP-bound traffic in their agreements without requiring payment to the terminating carrier, *e.g.*, by agreeing to a bill and keep arrangement. This tariff provision seems to purport to override any such agreement." *Order* at para. 23.

[50] *Global NAPs Petition* at 19.

[51] "The parties . . . would be in a position to expressly agree that payment at a rate of zero in the (hypothetical) bill-and-keep contract constitutes 'payment under an interconnection agreement' for purposes of the tariff." *Global NAPs Petition* at 19.

20. Global NAPs argues also that the problem identified by the Commission could not exist because a bill-and-keep clause in an interconnection agreement would not apply to jurisdictionally interstate ISP-bound traffic,[52] but since parties are free to agree to any terms they wish in negotiating agreements,[53] such a blanket statement is simply unsupportable. Finally, Global NAPs argues that if it had, in fact, agreed to accept no compensation for ISP-bound calls, then it is not clear that the Commission should prohibit it from enforcing a Tariff provision that contradicts that agreement. We have already stated quite clearly in the *Order*, however, that "it seems evident that any federal tariff purporting to govern inter-carrier compensation for ISP-bound traffic could be reasonable only if it mirrors any applicable terms of the party's interconnection agreement, as construed by the appropriate state commission. Using the tariff process to circumvent the section 251 and 252 process cannot be allowed."[54] We are not persuaded to revisit that conclusion.

21. In the end, Global NAPs argues that the Commission's concern should be resolved by interpreting the Tariff as considering the receipt of zero compensation for ISP-bound calls as constituting compensation under an interconnection agreement. Global NAPs' arguments, however, contradict themselves. Global NAPs has argued elsewhere in its petition that the Tariff is clear because one need not look to the terms of the interconnection agreement to determine whether compensation is due under the Tariff but only "to one's checkbook." Yet here, it asserts that one must understand the terms of the interconnection agreement in order to determine whether, where no check has been written, Global NAPs has nevertheless "received compensation" pursuant to the

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[52] *Global NAPs Petition* at 20.

[53] *See* 47 U.S.C. § 252(a)(1).

[54] *Order* at para. 23.

agreement. Global NAPs' arguments on this point simply demonstrate further the lack of clarity in its tariff.

22. In any event, even assuming, *arguendo*, that Global NAPs' interpretation of Tariff Section 7A.1 is plausible, so, too, is the Commission's interpretation, especially given the Commission's judicially recognized expertise in interpreting tariffs.[55] The existence of more than one plausible interpretation renders Tariff Section 7A.1 ambiguous about when charges accrue. Even Global NAPs acknowledges that ambiguous tariff provisions must be construed against the drafting carrier.[56] Thus, we may properly construe Section 7A.1 of the Tariff against Global NAPs and as failing to convey with the requisite clarity whether charges will accrue thereunder.

23. Global NAPs appears to rely on Tariff Section 7A.2, as well as Tariff Section 7A.1, to argue that the Commission erred in finding the Tariff to be indeterminate.[57] In our view,

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[55] *See, e.g., Ambassador, Inc. v. United States*, 325 U.S. 317, 324 (1945); *American Message Centers v. FCC*, 50 F.3d 35, 39 (D.C. Cir. 1995); *Allnet Communications Serv. Inc. v. National Exchange Carrier Association*, 965 F.2d 1118, 1120 (D.C. Cir. 1992); *Total Telecommunications Services, Inc. v. AT&T*, 919 F. Supp. 472, 480 (D.D.C. 1996), *aff'd*, 99 F.3d 448 (D.C. Cir. 1996).

[56] *Global NAPs Petition* at 21 n.24. *See, e.g., Commodity News Services, Inc. v. Western Union*, 29 FCC 1208, 1213, *aff'd* 29 FCC 1205 (1960).

[57] *Global NAPs Petition* at 17 n.20. Section 7A.2 of Global NAPs' Tariff provides: "A delivering LEC with which Company has an Interconnection Agreement may avoid charges under this Tariff by agreeing to treat ISP-bound calls delivered to Company as 'local traffic' subject to reciprocal compensation under Section 251(b)(5) and applicable terms of the Interconnection Agreement. Failure by such a carrier to actually compensate Company for ISP-bound traffic as local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate Company under the terms of this Tariff." Global NAPs Tariff, Section 7A.2.

however, Tariff Section 7A.1 purports to establish a threshold for the application of the Tariff at all. Therefore, where, as here, Tariff Section 7A.1 fails to establish clearly the Tariff's applicability, the terms of any other Tariff provision are irrelevant. Consequently, for all of the reasons described above, we reject Global NAPs' contention that we erred in concluding that the Tariff was unlawfully indeterminate.

2. The Tariff Contains an Impermissible Cross-Reference.

24. In order to implement section 201(b) of the Act (among other provisions), section 61.74(a) of our rules provides that "no tariff publication filed with the Commission may make reference to any other tariff publication or to *any other document or instrument*." [58] Global NAPs asserts that its Tariff does not violate section 61.74(a), because the Tariff is "complete in itself," and "none of the terms of any interconnection agreement has any relevance to the application of the tariff." [59] To support this assertion, Global NAPs repeats its argument that the applicability of the Tariff turns only on whether a delivering LEC has actually paid Global NAPs, and not also on whether an interconnection agreement requires a carrier to pay Global NAPs.

25. As we previously explained,[60] if we are to reconcile the Tariff language with Global NAPs' statements about

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[58] 47 C.F.R. § 61.74(a) (emphasis added). *See also* 47 U.S.C. § 201(b). Section 61.74(a) refers to any document referenced in a tariff, not just to documents containing information necessary to calculate a rate. *See, e.g., Amendments of Parts 1 and 61 of the Commission's Rules*, Report and Order, 98 F.C.C.2d 855, 876 at para. 80 (1984); *AT&T Communications Revisions to Tariff FCC No. 15, Competitive Pricing Plan No. 12, Transmittal No. 4742*, DA 93-383, Order, 1993 WL 756821 (Com. Car. Bur. rel. April 2, 1993).

[59] *Global NAPs Petition* at 22 (emphasis in original).

[60] *See* paras. 16-18, *supra*.

deferring to the state negotiation/arbitration processes, then to determine whether Global NAPs' Tariff applies, Bell Atlantic must consult the terms of its interconnection agreement to ascertain whether compensation for the delivery of ISP-bound traffic is required. Consequently, the Tariff's cross-reference to the interconnection agreement constitutes far more than a technical defect; it constitutes a fundamental flaw in the Tariff's clarity. Accordingly, even assuming, *arguendo*, that a tariff's reference to an exogenous document is improper only if the exogenous document contains information necessary to understand the tariff, the Tariff's bare cross-reference to an "interconnection agreement" violates section 61.74(a) of our rules and renders the Tariff unlawful.[61]

26. Global NAPs also argues that "it is far from clear that section 61.74(a) applies to Global NAPs' Tariff[, because] the Commission has permissively detariffed the provision of access services by non-dominant carriers. . ."[62] Thus, Global NAPs seems to suggest that, in light of our adoption of permissive detariffing policies, it should be excused from following the law that applies to tariffs that a carrier chooses to file.[63] Again, we disagree. Section 61.74(a) by its terms plainly applies to all tariff filings. Our order providing for permissive tariff filing does not exempt non-dominant carriers from Part 61 tariff filing requirements. If a non-dominant carrier chooses to file a tariff with the Commission, as Global NAPs has, it must comply with Part 61 of our

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[61] This is not to say that, in all instances, we would declare a tariff unenforceable for violations of section 61.74(a). *See, e.g., Berwind-White Coal Mining Company v. Chicago & Erie Railroad Company*, 235 U.S. 371 (1914) (upholding carrier's tariff because, unlike here, its defect was a technicality that did not implicate any fundamental aspects of the tariff's interpretation).

[62] *Global NAPs Petition* at 23.

[63] *Global NAPs Petition* at 23.

rules.[64] Global NAPs provides no compelling reason for us to abandon the very rules intended to protect those subject to filed tariffs. Accordingly, we affirm our conclusion that Global NAPs' Tariff impermissibly cross-references an external document (*i.e.*, an interconnection agreement), in violation of section 61.74(a) of our rules.

E. The Massachusetts DTE's February 25, 2000 Order Does Not Undermine Our Order.

27. On February 25, 2000, the Massachusetts DTE ruled, *inter alia*, that the existing interconnection agreement between Global NAPs and Bell Atlantic, as presently written, does not provide for inter-carrier compensation for ISP-bound traffic.[65] The Massachusetts DTE also ruled, however, that the parties could engage in further negotiations, mediation, and arbitration under section 252 of the Act to attempt to amend their existing interconnection agreement to provide for such compensation, apparently even retroactively for the period beginning when Bell Atlantic first stopped paying.[66]

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[64] *See* 47 U.S.C. § 201(b); 47 C.F.R. Part 61.

[65] *See Massachusetts DTE February 25, 2000 Order* at 16-21. This ruling by the Massachusetts DTE formed the primary basis on which the Common Carrier Bureau recently denied Global NAPs' peition for preemption pursuant to section 252(e)(5) of the Act, 47 U.S.C. § 252(e)(5). *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 99-354, Memorandum Opinion and Order, DA 00-510 (rel. March 7, 2000).

[66] *Massachusetts DTE February 25, 2000 Order* at 19-20. In particular, the *Massachusetts DTE February 25, 2000 Order* "reaffirm[s]" and "reiterate[s] (*id.* at 19) the Massachusetts DTE's prior direction that the carriers "begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for *all ISP-bound traffic that was not disbursed as of February 26, 1999,*

28. The *Massachusetts DTE February 25, 2000 Order* does not undermine the validity of our *Order*. Our *Order* hinged on the conclusion that, *when the Tariff was filed* in April 1999, it was indeterminate and cross-referenced an exogenous document. The *Massachusetts DTE February 25, 2000 Order* does not cure those problems retroactively. Moreover, on February 14, 2000, Global NAPs revised the Tariff at issue in such a way as to eliminate the provisions that were found unlawful in our *Order*.[67] Thus, the *Massachusetts DTE February 25, 2000 Order* can have no prospective effect on the original Tariff language. Consequently, the *Massachusetts DTE February 25, 2000 Order* provides no basis on which to reconsider our *Order*.

IV. ORDERING CLAUSE

29. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 201(b), 203(c), 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 203(c), 208, 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Global NAPs, Inc. IS DENIED.

Magalie Roman Salas

Secretary

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as well as all later-occurring ISP-bound traffic." Massachusetts DTE May 19, 1999 Order at 30 (emphasis added).

[67] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Revised Tariff F.C.C. No. 1, at 81-83.2, Sections 7, 7.1, 7.2, 7.3, 7.4, 7.5 (effective February 14, 2000).

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. E-99-22

In the Matter of

BELL ATLANTIC-DELAWARE, INC., BELL ATLANTIC-MARYLAND, INC., BELL ATLANTIC-NEW JERSEY, INC., BELL ATLANTIC-PENNSYLVANIA, INC., BELL ATLANTIC-VIRGINIA, INC., BELL ATLANTIC-WASHINGTON, D.C., INC., BELL ATLANTIC-WEST VIRGINIA, INC., NEW YORK TELEPHONE COMPANY, AND NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Complainants,

v.

GLOBAL NAPS, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1999 Released: December 2, 1999

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we resolve a formal complaint brought by various Bell Atlantic companies (collectively, Bell Atlantic) against a competitive local exchange carrier (CLEC), Global NAPs, Inc. (Global NAPs), pursuant to section 208 of the Communications Act of 1934, as amended (Act or Communications Act).[1] The complaint

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[1] 47 U.S.C. § 208.

challenges the lawfulness and application of certain Global NAPs tariff provisions that purport to charge a per-minute interstate rate for Internet calls, specifically, calls originated by Bell Atlantic customers that are handed off to Global NAPs for delivery to Internet service providers (ISPs).[2]

2. As explained below, we conclude that the challenged provisions of Global NAPs' tariff, as applied to ISP-bound traffic delivered by Bell Atlantic to Global NAPs in Massachusetts, are unjust and unreasonable under section 201(b) of the Act,[3] because those tariff provisions condition the imposition of charges on circumstances that were indeterminate when the tariff took effect and remain indeterminate today. In particular, the challenged tariff provisions purport to apply only to ISP-bound traffic for which Global NAPs receives no compensation from Bell Atlantic under the parties' existing interconnection agreement; however, the Massachusetts Department of Telecommunications and Energy (Massachusetts DTE) has yet to make a final determination whether and how the parties' existing interconnection agreement provides for inter-carrier compensation for ISP-bound traffic. Moreover, we conclude that the challenged tariff provisions violate section 61.74(a) of our rules, because they refer to a document other than the Tariff itself, *i.e.*, an interconnection agreement.[4] Accordingly, we hereby grant Bell Atlantic's complaint and hold that Sections 7 and 7A of Global NAPs' Tariff F.C.C. No. 1 are unlawful.

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[2] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1 (Tariff) at 82-83, Sections 7, 7A.1, 7A.2, 7A.3, 7A.4 (effective April 15, 1999).

[3] 47 U.S.C. § 201(b).

[4] 47 C.F.R. § 61.74(a).

II. BACKGROUND

A. Events Preceding the Commission's *Reciprocal Compensation Order*

3. On April 15, 1997, Global NAPs and New England Telephone and Telegraph Company for Massachusetts (Bell Atlantic) entered into an interconnection agreement that continues until April 15, 2000.[5] Pursuant to this agreement, Bell Atlantic carries traffic from its end user customers in Massachusetts to a point of interconnection with Global NAPs in Massachusetts; then Global NAPs delivers the traffic from the point of interconnection to its ISP customers in Massachusetts.[6]

4. The parties' interconnection agreement provides that "[r]eciprocal compensation only applies to the transport and termination of Local Traffic billable by NYNEX [now Bell Atlantic] which a Telephone Exchange Service Customer originates on NYNEX's or Global NAPs' network for

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[5] *See* Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, by and between New England Telephone and Telegraph Company and Global NAPs for Massachusetts (April 15, 1997) (Bell Atlantic-Global NAPs Interconnection Agreement), attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22. The agreement will automatically renew and remain in effect unless (1) either party gives notice of termination at least 60 days before April 15, 2000, or (2) after that date, either party gives a 90-day notice of termination. *Id.* at 36, Section 21; *see also* Global NAPs Answer, File No. E-99-22 (filed July 28, 1999) (Global NAPs Answer) at Attachment C.

[6] *See* Bell Atlantic-Global NAPs Interconnection Agreement at 14, Section 5.7.2; *see also* Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues Pursuant to Section 1.732(h) and Joint Statement Pursuant to Section 1.733(7)(b)(2), File No. E-99-22 (filed August 10, 1999) (Joint Statement) at 2.

termination on the other Party's network."[7] "Local Traffic" is defined as "a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts. . . ."[8] The interconnection agreement further provides that the parties "shall compensate each other for the transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Schedule."[9] According to the Pricing Schedule, reciprocal compensation for "Local Traffic" is $.008 per-minute.[10]

5. The parties executed their interconnection agreement despite their inability to reach a consensus on whether the above-quoted language in the interconnection agreement requires payment of reciprocal compensation for traffic that is delivered to ISPs, *i.e.*, calls made by one carrier's customers that are handed off to the other carrier for delivery to the latter carrier's ISP customers.[11] In place of such a consensus, the parties agreed to interpret the applicable language in their agreement in the same manner in which identical language in

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[7] Bell Atlantic-Global NAPs Interconnection Agreement at 14, Section 5.7.1. According to section 252 of the Act, "reciprocal compensation" arrangements must (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A).

[8] Bell Atlantic-Global NAPs Interconnection Agreement at 5, Section 1.38.

[9] Bell Atlantic-Global NAPs Interconnection Agreement at 14, Section 5.7.2.

[10] Bell Atlantic-Global NAPs Interconnection Agreement at 8, Pricing Schedule.

[11] *See* Chronology of Events Submitted Pursuant to Staff Request of August 3, 1999, File No. 99-22 (filed August 11, 1999) (Chronology of Events) at 11-12.

other Bell Atlantic/CLEC interconnection agreements was ultimately interpreted by the Massachusetts DTE.[12]

6. On June 26, 1998, MCI WorldCom Technologies, Inc. (MCI WorldCom), which provides competitive local exchange service in Massachusetts, filed a complaint against Bell Atlantic before the Massachusetts DTE regarding Bell Atlantic's failure to pay reciprocal compensation for ISP-bound traffic pursuant to their interconnection agreement.[13] On October 21, 1998, the Massachusetts DTE ruled in favor of MCI WorldCom, holding that the parties' agreement requires Bell Atlantic to pay reciprocal compensation for ISP-bound traffic.[14] The Massachusetts DTE noted that other CLECs' interconnection agreements (including Global NAPs') with Bell Atlantic contain identical provisions and directed Bell Atlantic to pay the applicable reciprocal compensation rate contained in those agreements, as well.[15] The express and exclusive basis for the Massachusetts DTE's decision was that: (a) the link between the caller and the ISP in ISP-bound traffic is jurisdictionally severable from the continuing link from the ISP to the target Internet site; (b) ISP-bound traffic is a "local" call under federal law and the interconnection agreement; and (c) ISP-bound traffic is

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[12] Chronology of Events at 11-12.

[13] Complaint of MCI WorldCom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 97-116-C (filed June 26, 1998), attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22.

[14] *See* Complaint of MCI WorldCom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 97-116 (Mass. D.T.E. rel. October 21, 1998) (*Massachusetts DTE October 21, 1998 Order*) at 12, attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22.

[15] *See Massachusetts DTE October 21, 1998 Order* at 14.

subject to the Massachusetts DTE's jurisdiction as an intrastate call.[16] In essence, the Massachusetts DTE viewed an Internet call as effectively two calls: a local call from the end user to the ISP, and a non-local call from the ISP to the Internet, *i.e.*, the "two-call" theory.[17]

B. The Commission's *Reciprocal Compensation Order*

7. On February 26, 1999, in response to a number of requests to clarify whether reciprocal compensation applies to ISP-bound traffic, we released the *Reciprocal Compensation Order*.[18] In that *Order*, we concluded that ISP-bound traffic "is jurisdictionally mixed and appears to be largely interstate in nature."[19] In reaching this conclusion, we "analyze[d] ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site."[20] Applying this analysis, we found that ISP-bound traffic "do[es] not terminate at the ISP's local server, . . . but continues to the ultimate destination or destinations, specifically at an Internet website that is often located in another state."[21] We expressly rejected the argument—on which the Massachusetts DTE had heavily relied in its October 21, 1998 order—that ISP-bound calls consist of severable local and non-local components, reasoning that "this argument is inconsistent with Commission precedent . . . holding that communications should be

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[16] *See Massachusetts DTE October 21, 1998 Order* at 6, 11-13.

[17] *See Massachusetts DTE October 21, 1998 Order* at 11-12.

[18] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, 3703, 3707, ¶¶ 1, 23, 28 (Feb. 26, 1999) (*Reciprocal Compensation Order*).

[19] *Reciprocal Compensation Order*, 14 FCC Rcd at 3689-90, ¶ 1; *see also id.* at 3697, 3701-3, 3704-5, ¶¶ 12, 18, 20, 23, 24.

[20] *Reciprocal Compensation Order*, 14 FCC Rcd at 3698-9, ¶ 13.

[21] *Reciprocal Compensation Order*, 14 FCC Rcd at 3697, ¶ 12.

analyzed on an end-to-end basis, rather than by breaking the transmission into component parts."[22]

8. We emphasized, however, that our conclusion that ISP-bound traffic is largely interstate "does not in itself determine whether reciprocal compensation is due in any particular instance."[23] As we explained, there currently is no federal rule governing inter-carrier compensation for ISP-bound traffic.[24] Consequently, whether such compensation is due in any particular instance hinges on the parties' contractual intent in entering into their interconnection agreement, or on the state commission's application of other legal or equitable principles to the parties' compensation dispute.[25]

9. Regarding the parties' intent, we stated that, given the absence of a federal rule governing inter-carrier compensation for ISP-bound traffic, "parties may [have] voluntarily include[d] this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act. . . ."[26] We explained that, where a state commission determines that the parties did, indeed, voluntarily include compensation for ISP-bound traffic in their interconnection agreement, the parties "are bound by those [interconnection] agreements, *as interpreted and enforced by the state commission[]*."[27] Moreover, we determined that such deference to state commission interpretations of parties' contractual

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[22] *Reciprocal Compensation Order*, 14 FCC Rcd at 3700, ¶ 15.

[23] Reciprocal Compensation Order, 14 FCC Rcd at 3689, ¶ 1.

[24] *Reciprocal Compensation Order*, 14 FCC Rcd at 3689, 3690, 3695, 3703, 3704-5, ¶¶ 1, 9, 22, 24, 25, 26; *see also* Joint Statement at 2.

[25] *Reciprocal Compensation Order*, 14 FCC Rcd at 3703-4, 3706, ¶¶ 22, 24, 27.

[26] *Reciprocal Compensation Order*, 14 FCC Rcd at 3703, ¶ 22; *see also id.* at 3703-4, ¶¶ 21, 24.

[27] *Reciprocal Compensation Order*, 14 FCC Rcd at 3703, ¶ 22 (emphasis added); *see also id.* at 3689-90, 3703-4, ¶¶ 1, 21, 24.

intent regarding compensation for ISP-bound traffic applies to state commission decisions that post-date, as well as pre-date, the *Reciprocal Compensation Order*.[28]

10. We went on to explain that, even where a state commission concludes that the parties did not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, "state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. . . . By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism."[29] Indeed, we observed that, "[i]n the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation."[30] We, therefore, concluded that "[u]ntil adoption of a final [federal] rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic," pursuant to their authority to approve

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[28] *Reciprocal Compensation Order*, 14 FCC Rcd at 3703-4, ¶ 24 ("Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, *or may make in the future*, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.") (emphasis added); *see also id.* at 3707, ¶ 28 ("[T]he Commission's holding that parties' agreements, as interpreted by state commissions, should be binding also applies to those state commissions that have not yet addressed the issue.").

[29] *Reciprocal Compensation Order*, 14 FCC Rcd at 3704-5, ¶¶ 25, 26 (footnotes omitted).

[30] *Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, ¶ 26.

interconnection agreements under sections 251 and 252 of the Act.[31] In sum, "in the absence of a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic," even where the parties' existing interconnection agreement is silent on the subject.[32]

C. Events After the Commission's *Reciprocal Compensation Order*

11. On April 14, 1999, Global NAPs filed with this Commission the federal tariff at issue here.[33] Global NAPs filed the Tariff on one day's notice pursuant to section 61.23(c) of our rules.[34] The Tariff purports to charge an interstate rate of $.008 per minute for all ISP-bound calls for which Global NAPs does not receive compensation under an interconnection agreement.[35] Towards that end, the Tariff states:

> This tariff applies to telecommunications delivered to the Company [*i.e.*, Global NAPs] by a local exchange carrier (the "Delivering LEC") for further delivery to an

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[31] *Reciprocal Compensation Order*, 14 FCC Rcd at 3707, ¶ 28.

[32] *Reciprocal Compensation Order*, 14 FCC Rcd at 3706, n.87. In the *Reciprocal Compensation Order*, the Commission also issued a notice of proposed rulemaking (NPRM) in which the Commission "tentatively conclude[d] that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act." *Id.* at 3707, ¶ 30. The comment cycle for this NPRM has concluded, and the Commission expects to issue an order resolving that proceeding in the near future.

[33] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1 (effective April 15, 1999).

[34] 47 C.F.R. § 61.23(c).

[35] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82-83, Sections 7A.1, 7A.4 (effective April 15, 1999); *see also* Joint Statement at 1-2.

> Internet Service Provider ("ISP") which obtains connections to the public switched network from the Company. This tariff applies to all ISP-bound traffic for which the Company does not receive compensation from the Delivering LEC under the terms of an interconnection agreement entered into pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended (an "Interconnection Agreement").[36]

12. On May 19, 1999, the Massachusetts DTE vacated its October 21, 1998 decision, concluding that our *Reciprocal Compensation Order* had invalidated the "two-call" theory on which the Massachusetts DTE had asserted jurisdiction over, and required reciprocal compensation for, ISP-bound traffic.[37]

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[36] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1 (effective April 15, 1999). Moreover, section 7A.2 of Global NAPs' tariff provides that "[a] delivering LEC with which Company has an Interconnection Agreement may avoid charges under this Tariff by agreeing to treat ISP-bound calls delivered to Company as 'local traffic' subject to reciprocal compensation under Section 251(b)(5) and applicable terms of the Interconnection Agreement. Failure by such a carrier to actually compensate Company for ISP-bound traffic as local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate Company under the terms of this Tariff." Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.2 (effective April 15, 1999). In addition, Section 7A.3 of Global NAPs' tariff provides that "[t]his tariff applies to all ISP-bound traffic that is subject to the jurisdiction of the Federal Communications Commission. To the extent that a Delivering LEC asserts that the terms of an Interconnection Agreement do not apply to some or all ISP-bound traffic due to the jurisdictionally interstate nature of such traffic, that assertion shall constitute a binding election to treat all ISP-bound traffic not subject to an Interconnection Agreement as jurisdictionally interstate and subject to this tariff." *Id.* at 82, Section 7A.3.

[37] *See* Complaint of MCI WorldCom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 97-116-C (Mass. D.T.E. rel. May 19, 1999) (*Massachusetts DTE*

The Massachusetts DTE ruled, therefore, that Bell Atlantic is not presently required to pay reciprocal compensation for ISP-bound traffic, retroactive to February 26, 1999.[38] The Massachusetts DTE expressly preserved the possibility, however, that provisions within *existing* interconnection agreements not inextricably bound to the "two-call" theory might require the payment of some compensation for the delivery of ISP-bound traffic.[39] Indeed, the Massachusetts DTE repeatedly acknowledged that, notwithstanding its vacation of its October 21, 1998 Order, the issue of whether *existing* interconnection agreements between Bell Atlantic and CLECs require some form of compensation for ISP-bound traffic remains a live dispute.[40] Accordingly, in

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May 19, 1999 Order), attached to Bell Atlantic Complaint, Attachment A at 24-25.

[38] *See Massachusetts DTE May 19, 1999 Order* at 28.

[39] In this regard, the Massachusetts DTE stated:

> During negotiations, the parties to this agreement may determine that adequate pricing and other terms for these transactions *are already governed by other contract provisions* (and, certainly, arguments along these lines have been advanced in the CLECs' comments. . . .). Or else, accepting or at least acquiescing in our view of Section 5.8 of the interconnection agreement, they may jointly conclude that the present agreement is silent on the point and needs to be supplemented to provide new terms for these mutual services. They are free to arrive *at either judgment in coming to terms over the present dispute*. The best outcome is for Bell Atlantic and MCI WorldCom (or other CLECs where other interconnection agreements are concerned) to arrive at a resolution themselves. A far less satisfactory outcome is for the Department to have to *interpret*, or even to supply, terms, because the parties cannot agree. *Massachusetts DTE May 19, 1999 Order* at 29 (emphases added).

[40] The Massachusetts DTE stated, for example:

> Although MCI WorldCom and Bell Atlantic *may still disagree* about reciprocal compensation obligations under their interconnection agreement, there is—*post* February 26, 1999—no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a *now-unresolved* dispute.

express reliance on the directives contained in our *Reciprocal Compensation Order*, the Massachusetts DTE stated that Bell Atlantic and applicable CLECs, including Global NAPs, should negotiate about the appropriate compensation mechanism for inter-carrier delivery of ISP-bound traffic pursuant to section 252 of the Act.[41] The Massachusetts DTE also offered to provide a mediator pursuant to section 252(a)(2) to facilitate the parties' negotiations.[42] The Massachusetts DTE further observed:

> If these negotiations do not resolve the present interconnection agreement dispute, the Department can

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Massachusetts DTE May 19, 1999 Order at 25-26 (emphases added). *See also, Massachusetts DTE May 19, 1999 Order* at 27 ("MCI WorldCom may choose to renew its complaint upon some claim that Massachusetts *contract law* or 'other legal or equitable considerations' give rise to mutual obligation on its and Bell Atlantic's parts to pay reciprocal compensation for ISP-bound traffic, even despite the FCC's jurisdictional pronouncement.") (emphasis added); *Massachusetts DTE May 19, 1999 Order* at 27 n.29 ("We do not, at this point, hazard a judgment whether such an alternative basis exists in the Bell Atlantic-MCI WorldCom interconnection agreement before us. If such a basis can be convincingly shown, then it would not be the Department's role to save contracting parties from later-regretted commercial judgments."); *Massachusetts DTE May 19, 1999 Order* at 28 n.30 (declining to rule whether MCI WorldCom must refund reciprocal compensation payments made by Bell Atlantic prior to the *Reciprocal Compensation Order*, because "[t]o do so now would be premature," given the continuing possibility that the existing interconnection agreement might be construed to have required such payments by Bell Atlantic.); n. 39, *supra*.

[41] *See Massachusetts DTE May 19, 1999 Order* at 30 ("[W]e expect carriers to begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for all ISP-bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic.").

[42] *See Massachusetts DTE May 19, 1999 Order* at 30 ("If need be, we would be willing to provide a Department mediator to facilitate agreement, pursuant to the mediation provision of section 252(a)(2).").

arbitrate the matter under section 252(b). At that time, consistent with the discretion we have been given by the FCC (at least until the NPRM is settled), the Department would resolve whatever issues are put before it.[43]

13. On May 27, 1999, Global NAPs forwarded a bill to Bell Atlantic pursuant to Sections 7 and 7A of its FCC Tariff No. 1, in which it sought payment, in the amount of $1,726,679, for ISP-bound traffic that Bell Atlantic delivered to Global NAPs in Massachusetts between April 15, 1999 and April 30, 1999.[44] Bell Atlantic has refused to pay this bill.[45] Subsequent to April 30, 1999, Global NAPs has forwarded to Bell Atlantic additional similar bills pursuant to its FCC Tariff No. 1, which Bell Atlantic has also not paid.[46]

14. On July 8, 1999, Bell Atlantic filed the instant complaint pursuant to section 208 of the Act challenging the lawfulness of Sections 7 and 7A of Global NAPs' F.C.C. Tariff No. 1. In its complaint, Bell Atlantic seeks a Commission finding that those tariff provisions are unjust and unreasonable under section 201(b) of the Act for the following reasons. First, Bell Atlantic claims that Global NAPs' tariff violates the so-called "ESP exemption," because said exemption allegedly precludes any carrier from assessing any per-minute interstate charges on ISP-bound traffic.[47]

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[43] *See Massachusetts DTE May 19, 1999 Order* at 30.

[44] Bell Atlantic Complaint at Attachment B; *see also* Joint Statement at 2.

[45] *See* Global NAPs Answer, Proposed Findings of Fact, at 2-3.

[46] *See* Global NAPs Answer, Proposed Findings of Fact, at 2-3.

[47] Bell Atlantic Complaint at 3, 8-9, 15 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3700, ¶ 16; GTE Telephone Operating Cos., GTOC Tariff No. 1 GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) (*GTE ADSL Order*)); Bell Atlantic's Brief on Non-Cost Issues, File No. E-99-22 (Bell Atlantic Non-Cost Brief) at 2, 6, 7-8 (filed Sept. 2, 1999) (*citing GTE ADSL Order*, 13 FCC Rcd at 22469-70, ¶ 7; MTS and

Second, Bell Atlantic argues that, if the ESP exemption does not apply, then Global NAPs' tariff violates our rules governing inter-carrier shared access arrangements, because said rules allegedly preclude carriers that jointly provide access service from charging each other for such service, and may even require Global NAPs to reimburse Bell Atlantic for a portion of the fees that Global NAPs receives from its ISP customers.[48] Third, Bell Atlantic asserts that Global NAPs' tariff violates our decision in the *Reciprocal Compensation Order* that, until a federal rule is adopted, the issue of compensation for inter-carrier delivery of ISP-bound traffic must be addressed *exclusively* through negotiations and state arbitrations under sections 251 and 252 of the Act.[49] Fourth,

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WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, Phase I, 97 F.C.C. 2d 682, 721 (1983) (*MTS and WATS Market Structure Order*)); Bell Atlantic Reply Brief on Non-Cost Issues, File No. E-99-22 (Bell Atlantic Non-Cost Reply Brief) at 2, 13-15 (filed Sept. 15, 1999) (*citing MTS and WATS Market Structure Order*, 97 FCC 2d 682, 721; *Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, ¶ 26.).

[48] Bell Atlantic Complaint at 3, 9-10 (*citing* Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Memorandum Opinion and Order, 4 FCC Rcd 7183, 7185-86 (1989); Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC Docket No. 86-104, Memorandum Opinion and Order, 2 FCC Rcd 4518, 4519 (1987); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Memorandum Opinion and Order, Phase I, 97 F.C.C. 2d 1082, 1176-77 (1984)); Bell Atlantic Non-Cost Brief, at 2, 8-9 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3695, ¶ 9; Access Billing Requirements for Joint Service Provision, 4 FCC Rcd 7183, ¶¶ 22-24; Waiver of Access Billing Requirements and Investigation of Permanent Modifications, 2 FCC Rcd 4518, ¶¶ 39-40; Investigation of Access and Divestiture Related Tariffs, 97 F.C.C. 2d 1082, 1176-77); Bell Atlantic Non-Cost Reply Brief, at 2, 12-15 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3695, 3705-6, ¶¶ 9, 26).

[49] Bell Atlantic Complaint at 3-4, 10 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, 3707-10, ¶¶ 26, 28-36); Bell Atlantic Non-Cost Brief, at 2, 9-13 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3704-6, ¶¶ 25-27); Bell Atlantic Non-Cost Reply Brief, at 1-2, 3-7

Bell Atlantic maintains that Global NAPs' tariff constitutes "cramming," because Bell Atlantic allegedly has not agreed to subscribe to the tariffed services at issue;[50] and finally, Bell Atlantic claims that Global NAPs' tariffed rates are unreasonably high.[51] For the reasons described below, we find that Global NAPs' tariff is unlawful, but for reasons other than those asserted by Bell Atlantic.[52]

III. DISCUSSION

15. The parties do not dispute one principle: the *Reciprocal Compensation Order* holds that carriers whose interconnection agreements include an inter-carrier compensation mechanism for ISP-bound traffic must abide by the state commission's determination regarding the existence and meaning of the mechanism.[53]

(*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, 3707, ¶¶ 26, 28).

[50] Bell Atlantic Complaint at 4, 10-13; Bell Atlantic Non-Cost Brief at 1-2, 3-4, 14; Bell Atlantic Non-Cost Reply Brief, at 2, 10-12 (*citing United Artists Payphone Corp. v. New York Telephone Company*, Memorandum Opinion and Order, File Nos. E-90-181, E-90-182, 8 FCC Rcd 5563 (1993); *MGC Communications Inc. v. AT&T Corp.*, DA 99-1395 (rel. July 16, 1999)).

[51] Bell Atlantic Complaint at 13, 15-16; Bell Atlantic's Brief on Cost Issues, at 1-2, 8; Bell Atlantic Reply Brief on Cost Issues, at 2, 5.

[52] Given our determination that Global NAPs' tariff violates the *Reciprocal Compensation Order*, we need not, and do not, reach the other issues raised in Bell Atlantic's complaint.

[53] *See* ¶ 9, *supra; see also US West Communications v. MFS Intelenet, Inc.*, ___F.3d ___, 1999 WL 799082 (9th Cir. (Wash.)) ("The FCC has held parties are bound by interconnection agreements that include ISP-Bound Traffic in their reciprocal compensation provisions and are approved by a state commission."); *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999) (stating that "[t]he Commission could not have made clearer [in the *Reciprocal Compensation Order*] its willingness—at least until a federal rule is promulgated—to let state commissions make the call [regarding the appropriate compensation mechanism for ISP-bound traffic.]").

16. As described above, the Massachusetts DTE has yet to make a full and final determination whether the existing interconnection agreement between Bell Atlantic and MCI WorldCom—and by extension, other CLECs, including Global NAPs—provides for any inter-carrier compensation for ISP-bound traffic.[54] Not only did the Massachusetts DTE state repeatedly in its May 19, 1999 Order that this issue remains live and disputed, but the May 19, 1999 Order itself (from which 2 of the 5 Commissioners partially dissented) is the subject of several pending petitions for reconsideration.[55] Moreover, on April 16, 1999, Global NAPs filed with the Massachusetts DTE a complaint against Bell Atlantic regarding this very issue, and the Massachusetts DTE has not yet resolved Global NAPs' complaint.[56] Indeed, in its briefs here, Global NAPs acknowledges (albeit in passing) that the Massachusetts DTE still could decide that the existing interconnection agreement between the parties requires Bell Atlantic to compensate Global NAPs in some way for the delivery of ISP-bound traffic.[57]

17. Sections 251 and 252 of the Act create, *inter alia*, negotiation and arbitration procedures for CLECs to interconnect with incumbent LECs in order to provide

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[54] *See* ¶ 12, *supra.*

[55] *See, e.g.,* MCI WorldCom Technologies, Inc. Order, D.T.E., 97-116-D, Motions for Reconsideration filed by Global NAPs, Sprint Communications, and RCN Telecom (July 13, 1999).

[56] *See* Complaint of Global NAPs, Inc. v. Bell Atlantic, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 99-39 (filed April 16, 1999), attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22; *see also* Initial Brief of Global NAPs on Non-Cost Issues, at 41 n.32.

[57] Initial Brief of Global NAPs on Non-Cost Issues, at 41; Reply Brief of Global NAPs, at 20. Global NAPs characterizes this possibility as remote, at best, but we must accept at face value the Massachusetts DTE's repeated assertions that it still could construe the existing interconnection agreement as requiring inter-carrier compensation for ISP-bound traffic.

competing communications services. Congress gave exclusive authority over those processes to state commissions, even though the interconnection matters encompassed by sections 251 and 252 have both interstate and intrastate aspects.[58] Thus, the fact that ISP-bound traffic is largely interstate does not necessarily mean that such traffic cannot fall within the state-supervised negotiation and arbitration processes set forth in sections 251 and 252.[59]

18. A careful reading of sections 251 and 252 reveals, in fact, that ISP-bound traffic may fall within the state-supervised negotiation and arbitration processes set forth therein.[60] It is beyond debate that the rates, terms, and conditions under which carriers will exchange traffic may be essential terms of some interconnection agreements. Moreover, sections 252(b)(1), (b)(4)(C), and (c)(1) require a state commission to resolve any "open issues" between the parties negotiating an interconnection agreement, and, in doing so, to

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[58] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15520, ¶ 41 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd*), *aff'd in part and rev'd in part sub nom. AT&T Cos. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996); *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996); *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12460 (1997); *further recon. pending*; *see also Reciprocal Compensation Order*, 14 FCC Rcd at 3704-5, ¶ 25.

[59] *Reciprocal Compensation Order*, 14 FCC Rcd at 3704-5, ¶ 25.

[60] In conducting arbitration procedures under section 252 of the Act, however, state commissions still must comply with our rules and our interpretation of the Act. Thus, when we adopt federal rules for inter-carrier compensation for ISP-bound traffic, state commissions conducting arbitrations must abide by these rules.

ensure that such resolution meets the requirements of section 251.[61] Section 251(d)(3) specifically preserves state authority to impose any "access and interconnection obligations" that are not either inconsistent with or disruptive of the requirements and purposes of the Act.[62] Thus, it was within our discretion to direct in the *Reciprocal Compensation Order* that, on an interim basis, inter-carrier compensation for ISP-bound traffic should be treated as an "open issue" subject to the state-supervised negotiation/mediation/arbitration processes set forth in sections 251 and 252 of the Act. Accordingly, whether the existing interconnection agreement between Bell Atlantic and Global NAPs does or should provide for inter-carrier compensation for ISP-bound traffic is an appropriate area of inquiry for the Massachusetts DTE under sections 251 and 252 of the Act, even though ISP-bound traffic is largely interstate.

19. Global NAPs does not appear to argue otherwise. In fact, Global NAPs (along with other Intervenors) filed a brief in the appeal of the *Reciprocal Compensation Order* contending (consistent with our analysis here) that state commissions do have authority under sections 251 and 252 of the Act to determine whether interconnection agreements do or should contain inter-carrier compensation mechanisms for ISP-bound traffic.[63]

20. Global NAPs points to our brief in the appeal of the *Reciprocal Compensation Order* to support its position that, until we adopt a federal rule on the subject, state commissions have *concurrent*, not *exclusive*, authority to establish inter-carrier compensation for ISP-bound traffic.[64] This means, in

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[61] 47 U.S.C. §§ 252(b)(1), 252(b)(4)(C), and 252(c)(1).

[62] 47 U.S.C. § 251(d)(3).

[63] *See* Joint Brief of Intervenors in Support of Respondents in Opposition to the LEC Petitioners, *Bell Atlantic Telephone Companies, Inc. et al. v. FCC*, Nos. 99-1094, *et al.* (filed August 5, 1999).

[64] *See* Initial Brief of Global NAPs on Non-Cost Issues, at 4, 34-35;

Global NAPs' view, that its federal tariff properly invokes the Commission's concurrent jurisdiction. The Commission, however, speaks through its orders, and nothing in our *Reciprocal Compensation Order* changes the analysis herein.

21. We need not decide here in the abstract whether Global NAPs may file any tariff addressing compensation for terminating ISP-bound traffic, because we find the tariff before us to be unjust and unreasonable. Section 7A.1 of the tariff provides that the tariff applies "to all ISP-bound traffic for which the Company does not receive compensation from the Delivering LEC under the terms of an interconnection agreement entered into pursuant to sections 251 and 252 of the Communications Act. . . ."[65] As first explained above, however, the parties do not know at this time whether compensation is due pursuant to their agreement, and will not know until the Massachusetts DTE makes its final deter-

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Reply Brief of Global NAPs, at 18-19; *see also* Brief for Federal Communications Commission, *Bell Atlantic Telephone Companies, et al v. FCC*, Nos. 99-1094 *et al*, at 47 (filed July 22, 1999). The portion of the Commission's D.C. Circuit brief to which Global NAPs refers states:

> The ILECs assert that the Commission has no authority to "authorize" state commissions to impose reciprocal compensation obligations to calls beyond the scope of Section 251(b)(5). . . . In this case, the Commission is not affirmatively authorizing the state commissions to impose reciprocal compensation obligations; the Commission is rendering an interpretation that imposing such obligations is not inconsistent with the Act or with existing federal rules, and therefore is not prohibited. The Commission issued a declaratory ruling to remove uncertainty and to settle a controversy, rather than an order authorizing, mandating, or prohibiting any particular action. Thus, the issue is not whether the Commission improperly authorized the state commissions to take a particular action, but whether the Commission correctly determined that state commissions have authority to take that action in the absence of contrary federal law. *Id.*

[65] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1 (effective April 15, 1999).

mination. Indeed, they have apparently been unsure of the answer to this question even since the agreement was signed.[66] Thus, the parties are unable today to determine whether this tariff is actually applicable. We find that Global NAPs has acted unreasonably in implementing tariff provisions under which the purported customer cannot readily discern whether it is incurring the tariffed charges at the time that they are allegedly incurred. We find that Global NAPs cannot reasonably bill Bell Atlantic under this tariff when the very applicability of the tariff has yet to be determined.

22. The contingent and unclear applicability of the tariff defies the Commission's longstanding interpretation of section 201(b) of the Act, as reflected in section 61.2 of our rules.[67] Those authorities require that the applicability of the tariff rate, and its terms, be clear and explicit.

23. Moreover, it seems evident that any federal tariff purporting to govern inter-carrier compensation for ISP-bound traffic could be reasonable only if it mirrors any applicable terms of the party's interconnection agreement, as construed by the appropriate state commission. Using the tariff process to circumvent the section 251 and 252 processes cannot be allowed. In this regard, we find the tariff to be unreasonable in another respect. Section 7A.1 purports to apply the tariff even when a valid interconnection agreement could be in place. That is, the tariff by its terms applies not simply where no agreement addresses compensation for the traffic at issue, but in any circumstance where Global NAPs does not receive compensation. It is certainly possible that parties could have addressed ISP-bound traffic in their agreements without requiring payment to the terminating

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[66] *See* ¶ 4, *supra*.

[67] 47 U.S.C. § 201(b). Section 61.2 of the Commission's rules states that "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clea[r] and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2.

carrier, *e.g.*, by agreeing to a bill and keep arrangement. This tariff provision seems to purport to override any such agreement.

24. Finally, in addition to the above findings, Global NAPs' tariff is unlawful on independent grounds. In particular, its tariff is not self-contained, but instead cross references, impermissibly, "an interconnection agreement."[68] This violates section 61.74(a) of our rules,[69] which provides that, in the absence of a waiver granted under sections 61.151, 61.152, and 61.153 of the Commission's rules,[70] "no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument."[71] As the Commission has declared previously,

> "a tariff should be complete when filed. Confusion may result if references to other tariffs [or documents] are allowed since all important information will not be consolidated in one place and references may be incomplete. In addition, referenced documents may not be easily accessible to the public."[72]

Global NAPs' improper cross-referencing of an exogenous document renders the challenged tariff provisions unlawful and is an independent and sufficient basis for granting Bell Atlantic's complaint.[73]

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[68] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1.

[69] 47 C.F.R. § 61.74(a).

[70] 47 C.F.R. §§ 61.151, 61.152, 61.153.

[71] 47 C.F.R. § 61.74(a).

[72] Amendment of Parts 1 and 61 of the Commission's Rules, Report and Order, 98 F.C.C.2d 855, 876 at ¶80 (1984).

[73] *See* Revisions to Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Order, 4 FCC Rcd 2624 (1988); AT&T Communications Revisions to Tariff F.C.C. No. 15, Competitive Pricing Plan No. 12, DA

IV. CONCLUSION

25. For the foregoing reasons, we grant Bell Atlantic's complaint and hold that Sections 7 and 7A of Global NAPs' tariff are unlawful under section 201(b) of the Act. In addition, we find that Sections 7 and 7A of Global NAPs' tariff are unlawful, because they do not comply with Part 61 of our rules.

26. Having found that the Tariff is unlawful for the reasons set forth above, we need not reach each of the other grounds asserted by Bell Atlantic in its complaint. We caution that this does not, however, constitute a conclusion that the Tariff is reasonable with respect to issues not raised or discussed here.

V. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), and 208 and sections 61.2 and 61.74 of the Commission's rules, 47 C.F.R. §§ 61.2, 61.74, that Bell Atlantic's complaint is GRANTED, to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

93-383, Order, 1993 WL 756821 (Com. Car. Bur. rel. April 2, 1993); Lincoln Telephone and Telegraph, Memorandum Opinion and Order, 78 F.C.C. 2d 1219 (1998).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2000

[Filed June 29, 2001]

No. 00-1136

GLOBAL NAPS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents,

VERIZON DELAWARE, INC., *et al.*,
Intervenors.

BEFORE: Williams, Sentelle and Rogers, *Circuit Judges*.

ORDER

Upon consideration of petitioner's petition for rehearing filed June 11, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

By: Robert A. Bonner
Deputy Clerk

APPENDIX E

STATUTES

47 USC § 160. Competition in Provision of Telecommunications Service

(a) Regulatory flexibility.—Notwithstanding Section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive Effect To Be Weighed.—In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, inclusing the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for Forbearance.—Any telecommunications carrier, or class of telecommunications carriers, may submit a

petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant of deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation.—Except as provided in Section 251(f), the Commission may not forbear from applying the requirements of Section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State Enforcement After Commission Forbearance.—A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).

47 USC § 201. Service and Charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, that communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, that nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, that nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

47 USC § 202. Discrimination and Preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 USC § 203. Schedules of Charges

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published

in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 USC § 204. Hearing as to Lawfulness of New Charges; Suspension

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all

other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to the date of enactment of this paragraph, issue an order concluding the hearing not later than 12 months after such date of enactment.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under Section 402(a).

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further

order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).

47 USC § 205. Commission Authorized to Prescribe Just and Reasonable Charges

(a) Whenever, after full opportunity for hearing, upon a complaint or under an investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

47 USC § 206. Liability of Carriers for Damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 USC § 207. Recovery of Damages

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such persons shall not have the right to pursue both such remedies.

47 USC § 208. Complaints to the Commission

(a) Any person, any body politic or municipal organization, or state commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability

to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to the date of enactment of this subsection, issue an order concluding the investigation not later than 12 months after such date of enactment.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under Section 402(a).

47 USC § 209. Orders for Payment of Money

If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

47 USC § 251. Interconnection

(a) General Duty of Telecommunications Carriers.—Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) Obligations of All Local Exchange Carriers.—Each local exchange carrier has the following duties:

(1) Resale.—The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability.—The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity.—The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way.—The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) Reciprocal compensation.—The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional Obligations of Incumbent Local Exchange Carriers.—In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate.—The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled access.—The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale.—The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes.—The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation.—The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation.—

(1) In general.—Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards.—In determining what network elements should be made available for purposes of subsection

(c)(3), the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of state access regulations.—In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering Administration.—

(1) Commission authority and jurisdiction.—The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs.—The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, Suspensions, and Modifications.—

(1) Exemption for certain rural telephone companies.—

(A) Exemption.—Subsection (c) of this section shall not apply to a rural telephone company until

(i) such company has received a bona fide request for interconnection, services, or network elements, and

(ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule.—The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption.—The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural

telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) Suspensions and modifications for rural carriers.—A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity. The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued Enforcement of Exchange Access and Interconnection Requirements.—On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with

the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of Incumbent Local Exchange Carrier.—

(1) Definition.—For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 CFR 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents.—The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings Provision.—Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

47 USC § 252. Procedures For Negotiation, Arbitration, And Approval Of Agreements

(a) Agreements Arrived at Through Negotiation.—

(1) Voluntary negotiations.—Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation.—Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements Arrived at Through Compulsory Arbitration.—

(1) arbitration.—During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.—

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond.—A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by state commission.—

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate.—The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for Arbitration.—In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing Standards.—

(1) Interconnection and network element charges.—Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.—

(A) In general.—For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction.--This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obli-

gations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services. —For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State Commission.—

(1) Approval required.—Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection.—The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement

does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority.—Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision.—If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if state will not act.—If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of state commission actions.—In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination

may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) Statements of Generally Available Terms.—

(1) In general.—A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State commission review.—A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review.—The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review.—Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected.—The submission or approval of a statement under this subsection shall not relieve

a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) Consolidation of State Proceedings.—Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) Filing Required.—A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to Other Telecommunications Carriers.—A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of Incumbent Local Exchange Carrier.—For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

REGULATIONS

47 C.F.R. § 61.2 General tariff requirements.

(a) In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.

(b)Tariff publications must be delivered to the Commission free from all charges, including claims of postage.

(c) Tariff publications will not be returned.

47 C.F.R. § 61.23 Notice requirements.

(a) Every proposed tariff filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least the number of days notice specified in this section.

(b) Notice is accomplished by filing the proposed tariff changes with the Commission. Any period of notice specified in this section begins on and includes the date the tariff is received by the Commission, but does not include the effective date. In computing the notice period required, all days including Sundays and holidays must be counted.

(c) All tariff filings of domestic and international non-dominant carriers must be made on at least one day's notice.

47 C.F.R. § 61.74 References to other instruments.

(a) Except as otherwise provided in this and other sections of this part, no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument.

(b) Tariffs for end-on-end through services may reference the tariffs of other carriers participating in the offering.

(c) Tariffs may reference concurrences for the purpose of stating where rates or regulations applicable to a service not governed by the tariff may be found.

(d) Tariffs may reference other FCC tariffs that are in effect and on file with the Commission for purposes of determining mileage, or specifying the operating centers at which a specific service is available.

(e) Tariffs may reference technical publications which describe the engineering, specifications, or other technical aspects of a service offering, provided the following conditions are satisfied:

(1) The tariff must contain a general description of the service offering, including basic parameters and structural elements of the offering;

(2) The technical publication includes no rates, regulatory terms, or conditions which are required to be contained in the tariff, and any revisions to the technical publication do not affect rates, regulatory terms, or conditions included in the tariff, and do not change the basic nature of the offering;

(3) The tariff indicates where the technical publication can be obtained;

(4) The referenced technical publication is publicly available before the tariff is scheduled to take effect; and

(5) The issuing carrier regularly revises its tariff to refer to the current edition of the referenced technical publication.

APPENDIX F

SECTION 7—INTERCONNECTION SERVICE

7.1 General

When the Company's on-net facilities overlap the service territory of other local exchange or access service providers, calls originating on the other carriers' networks may be terminated to end user customers served by the Company's facilities. Where contractual interconnection agreements have been approved by the local regulatory agency and are not preempted by federal authority, the terms of the contractual agreement shall apply. Where contractual interconnection agreements do not apply and the FCC has exerted jurisdiction, interconnection will be provided at rates specified below.

7.2 Limitations

The Company reserves the right to require reasonable forecasts of traffic to meet extraordinary demands for traffic handling capacity on a case by case basis.

7.3 Application of Interstate Charges

Interstate rates apply only to that portion of Interconnection Service provided for interstate usage. Jurisdictional reporting is required as described in Section 2.20.9 of this tariff. The Interconnection Charge applies based on usage, aggregated on a billing cycle basis, in addition to all other applicable charges for meet point arrangements or other physical arrangements necessary to facilitate the transfer of traffic between carriers.

7.4 Rates and Charges

Interconnection Charge per minute: $0.008

SECTION 7A—ISP TRAFFIC DELIVERY SERVICE

7A.1 *Scope Of Tariff.*

This Tariff applies to telecommunications delivered to the Company by a local exchange carrier (the "Delivering LEC") for further delivery to an Internet Service Provider ("ISP") which obtains connections to the public switched network from the Company. This tariff applies to all ISP-bound traffic for which the Company does not receive compensation from the Delivering LEC under the terms of an interconnection agreement entered into pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended (an "Interconnection Agreement").

7A.2 Delivering LEC Election To Obtain Service Pursuant To This Tariff.

A Delivering LEC with which Company has an Interconnection Agreement may avoid charges under this Tariff by agreeing to treat ISP-bound calls delivered to Company as "local traffic" subject to reciprocal compensation under Section 251(b)(5) and applicable terms of the Interconnection Agreement. Failure by a such a carrier to actually compensate Company for ISP-bound traffic as local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate Company under the terms of this Tariff.

7A.3 Application Of Tariff.

This Tariff applies to all ISP-bound traffic that is subject to the jurisdiction of the Federal Communication Commission. To the extent that a Delivering LEC asserts that the terms of an Interconnection Agreement do not apply to some or all ISP-bound traffic due to the jurisdictionally interstate nature of

such traffic, that assertion shall constitute a binding election to treat all ISP bound traffic not subject to an Interconnection Agreement as jurisdictionally interstate and subject to this Tariff.

7A.4 Rates

This Tariff establishes a switching rate which relates to the function Company undertakes in directing a call dialed by a Delivering LEC's end user to the ISP (served by the Company) that the end user wants to reach. This rate applies per minute of use.

Rate: $0.008/minute

7A.5 Billing

Billing for charges under this tariff shall normally be monthly in arrears. Failure to render a bill shall not constitute a waiver of Company's right to payment for any services provided, as long as the bill for any such period is rendered no later than two years following the expiration of that period.

Payment shall be due in immediately available funds no later than 30 days after the date of the bill.

Supreme Court, U.S.
FILED
NOV 28 2001

No. 01-543

In the Supreme Court of the United States

GLOBAL NAPS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission, acting on a complaint brought pursuant to Section 208 of the Communications Act of 1934, 47 U.S.C. 208 (1994 & Supp. V 1999), properly concluded that petitioner's tariff was unlawful under Section 201(b) of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 247 F.3d 252. The opinions and orders of the Federal Communications Commission (Pet. App. 15a-35a and 36a-57a) are reported at 15 F.C.C.R. 5997 and 15 F.C.C.R. 12,946.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2001. A petition for rehearing was denied on June 29, 2001 (Pet. App. 58a). The petition for a writ of certiorari was filed on September 27, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

On April 14, 1999, petitioner, a competitive local exchange carrier (LEC), filed a tariff that purported to impose a $0.008 per minute surcharge on the delivery of all Internet-bound calls for which it "does not receive compensation * * * under the terms of an interconnection agreement." Pet. App. 86a-87a. Verizon Communications filed a complaint with the FCC contesting petitioner's tariff. *Id.* at 5a. The FCC invalidated the tariff on the grounds that it was "unjust and unreasonable," in violation of 47 U.S.C. 201(b), and that it was inconsistent with two of the Commission's rules. Pet. App. 36a-57a. The Commission also denied petitioner's request for reconsideration. *Id.* at 15a-35a. Petitioner filed a petition for review of both orders, which the court of appeals denied. *Id.* at 1a-14a.

1. LECs are required to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5) (Supp. V 1999). Under such arrangements, the carrier that originates a call on behalf of the calling party is paid by its customer and then compensates the carrier that completed the call. The FCC had interpreted Section 251(b)(5) as applying only to "local calls"—those that "originate and terminate within a local [call] area," Pet. App. 2a (citing *In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, 11 F.C.C.R. 15,499, 16,013 para. 1034 (1996)), but carriers are permitted to include provisions in their interconnection agreements that go beyond the requirements mandated by law, 47 U.S.C. 252(e)(1) (Supp. V 1999). Parties to interconnection agreements are supposed to negotiate the rates and terms under which compensation will be paid, but they may submit the matter to

arbitration by the relevant state public utility commission if they are unable to agree. Pet. App. 2a (citing 47 U.S.C. 252(e)(1) (Supp. V 1999)).

Petitioner and Verizon are parties to interconnection agreements in several States. Pet. App. 4a. In 1997, they entered into an agreement in Massachusetts that provides that "'[r]eciprocal compensation only applies to the transport and termination of Local Traffic,' defined as 'a call which is originated and terminated within a given [Local Access and Transport Area or "LATA"]' in Massachusetts." *Ibid.* (quoting agreement). The parties could not agree whether this clause covered Internet-bound calls to Internet Service Providers (ISPs), but agreed to be bound by any interpretations of that clause or of identical language in other agreements to which Verizon was a party that were rendered by the Massachusetts Department of Telecommunications and Energy (Massachusetts DTE). *Ibid.*

On October 21, 1998, the Massachusetts DTE ruled that Verizon was required to pay reciprocal compensation for the delivery of Internet-bound traffic to MCI WorldCom, and directed Verizon to pay reciprocal compensation to other LECs (including petitioner) with which it had identical agreements. Pet. App. 4a (citing *Complaint of MCI WorldCom, Inc.*, D.T.E. 97-116 (Mass. D.T.E. Oct. 21, 1998)). In February 1999, however, the FCC issued an order holding that Internet-bound calls "are not local" (and thus not covered by the requirements of 47 U.S.C. 251(b)(5) (Supp. V 1999)) because "[w]hile the call to the ISP may be local, * * * the terminating end of the call is actually the site reached by the Internet connection." Pet. App. 3a (citing *In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, Inter-carrier*

Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689, 3704 para. 24 (1999)).[1] On May 19, 1999, the Massachusetts DTE vacated its prior order and held that Verizon was not required to pay reciprocal compensation for Internet-bound traffic. *Id.* at 4a-5a (citing *Complaint of MCI WorldCom, Inc.*, D.T.E. 97-116-C (Mass. D.T.E. May 19, 1999) (5/19/99 DTE Order)).[2] The Massachusetts DTE did, however, order Verizon to pay an amount equal to the interconnection agreement's reciprocal compensation rate applied to the traffic not in excess of a 2:1 terminating-to-originating ratio, see *id.* at 25a (citing 5/19/99 DTE Order 28; *Complaint of MCI WorldCom, Inc*, D.T.E. 97-116-D, at 16 n.11 (Mass. D.T.E. Feb. 25, 2000) (2/25/00 DTE Order)), and ruled "that the parties could engage in further negotiations, mediation, and arbitration under section 252 of the Act to attempt to amend their existing interconnection agreement to provide for such

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[1] The D.C. Circuit vacated and remanded this order, holding that the FCC had not provided an adequate explanation of why Internet-bound calls could not be treated as local calls. See *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1 (D.C. Cir. 2000). On April 27, 2001, the Commission issued an order reaffirming its conclusion that ISP-bound traffic is not subject to the reciprocal compensation requirement of Section 251(b)(5), albeit based on a different rationale. The Commission explained that a different statutory provision, 47 U.S.C. 251(g) (Supp. V 1999), demonstrated Congress's intent to exclude ISP-bound traffic from the requirements of Section 251(b)(5). *In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, No. 96-98, para. 34 (FCC Apr. 27, 2001), 2001 WL 455869.

[2] The Massachusetts DTE reaffirmed this ruling after the D.C. Circuit vacated the FCC's order. See Pet. App. 5a (citing *Complaint of MCI WorldCom, Inc.*, D.T.E. 97-116-D (Mass. D.T.E. Feb. 25, 2000)).

compensation * * * for the period beginning when [Verizon] first stopped paying." *Id.* at 34a (citing 2/25/00 DTE Order 19-20).

2. On April 14, 1999, before the Massachusetts DTE vacated its original decision, petitioner filed the tariff at issue here with the FCC. Pursuant to the Commission's rules, the tariff was filed on one day's notice and took effect the next day. See 47 C.F.R. 61.23(c). The tariff provided for a surcharge of $0.008 per minute on "all ISP-bound traffic for which [petitioner] does not receive compensation * * * under the terms of an interconnection agreement." Pet. App. 86a-87a. The tariff further declared that "[f]ailure * * * to actually compensate [petitioner] for ISP-bound traffic as local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate [petitioner] under the terms of this Tariff." *Id.* at 87a. On May 27, 1999, petitioner billed Verizon for approximately $1.7 million pursuant to this tariff. *Id.* at 5a. Verizon refused to pay, and, on July 8, 1999, it filed a complaint with the FCC pursuant to 47 U.S.C. 208 (1994 & Supp. V 1999). Pet. App. 5a.[3]

3. The Communications Act of 1934 requires that all "charges, practices, classifications, and regulations" related to interstate communications services must be "just and reasonable." 47 U.S.C. 201(b). The FCC has been empowered to promulgate rules "as may be necessary in the public interest to carry out the provisions of this [Act]," *ibid.*, and to regulate the form and content of tariffs that LECs impose on each other, see 47 U.S.C. 203. The Commission is also authorized "to investigate

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[3] Section 208(a) permits "[a]ny person * * * complaining of anything done or omitted to be done by any common carrier subject to this [Act]" to file a complaint with the Commission.

* * * matters complained of in such manner and by such means as it shall deem proper," 47 U.S.C. 208(a), and to "issue * * * order[s] concluding such investigation[s]." 47 U.S.C. 208(b)(1) (Supp. V 1999); 47 U.S.C. 208(b)(2). Such orders are "final order[s]" that may be appealed to the D.C. Circuit pursuant to 47 U.S.C. 402(a). See 47 U.S.C. 208(b)(3).

On December 2, 1999, the Commission granted Verizon's complaint and held that petitioner's tariff was unlawful. Pet. App. 36a-57a. The Commission concluded that "the challenged provisions of [petitioner's] tariff * * * are unjust and unreasonable under Section 201(b) of the Act" because they "condition the imposition of charges on circumstances that were indeterminate when the tariff took effect and remain indeterminate today." *Id.* at 37a (footnote omitted). The Commission observed that the parties had agreed to submit to the Massachusetts DTE the question of whether the reciprocal compensation provisions of their interconnection agreement applied to ISP-bound traffic, *id.* at 39a-40a, and noted that DTE had not reached a final determination regarding that question when petitioner filed its tariff, *id.* at 51a. Consequently, explained the Commission, the parties did not know at the time the tariff was filed whether petitioner would receive compensation for such traffic pursuant to the terms of the interconnection agreement, and thus could not determine whether payment was mandated under the tariff. *Id.* at 37a, 51a-55a. The Commission thus concluded that the tariff violated "section 201(b) of the Act, as reflected in section 61.2 of our rules." *Id.* at 55a; see 47 C.F.R. 61.2(a) ("[A]ll tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.").

The Commission also concluded that the tariff was unlawful for another reason. The Commission's rules provide that, in the absence of a valid waiver, "no tariff publication filed with the Commission may make reference to * * * any other document or instrument." 47 C.F.R. 61.74(a). The Commission held that petitioner's tariff violated this mandate because it "is not self-contained, but instead cross references, impermissibly, 'an interconnection agreement.'" Pet. App. 56a.

4. Petitioner sought reconsideration, which the Commission denied. Pet. App. 15a-35a. As pertinent here, petitioner argued that it was "unjust and unreasonable * * * to retroactively relieve [Verizon] of any obligation to pay anything at all for the work [petitioner] does in delivering jurisdictionally interstate ISP-bound traffic at [Verizon's] request." *Id.* at 24a (quoting petitioner's brief). The Commission responded that petitioner "could have reached a mutually acceptable resolution with [Verizon] regarding intercarrier compensation for ISP-bound traffic *before* executing an interconnection agreement with, and accepting traffic from, [Verizon]." *Id.* at 24a-25a. "Having freely chosen to (1) forego the certainty of compensation through a jointly acknowledged agreement * * *, and (2) litigate the compensation issue with the Massachusetts DTE," petitioner, reasoned the Commission, "cannot be heard now to complain that it is somehow 'unfair' to disallow compensation under the entirely separate, and mutually exclusive, tariff process." *Ibid.* The Commission also stressed that petitioner "has * * * obtained the right to receive compensation" because the Massachusetts DTE had ordered Verizon to "pay an amount equal to the contract's reciprocal compensation rate applied to the traffic not in excess of

a 2:1 terminating-to-originating ratio" and had "afforded [petitioner] the opportunity to try to obtain more compensation [t]han that * * * pursuant to additional negotiation/mediation/arbitration under section 252 of the Act." *Id.* at 25a-26a (footnote omitted).

5. Petitioner filed a petition for review, which the D.C. Circuit denied. Pet. App. 1a-14a. The court of appeals specifically upheld the Commission's determination that the tariff was invalid as filed because it conflicted with two of the Commission's rules. *Id.* at 10a-11a. The court also rejected petitioner's assertion that the FCC "does not have the authority to invalidate tariffs under Section 208." *Id.* at 11a. Finally, the court described as "clearly wrong" petitioner's argument that relief granted in a formal complaint proceeding under Section 208 cannot be retroactive in effect. *Id.* at 13a. It noted that "insofar as Section 208 authorizes the award of damages or other remedies, it is always 'retroactive' in its application in that it will always be changing the economic consequences of a carrier's prior conduct." *Ibid.* Where, as "was the case here," a tariff is "so plainly defective as to be a legal nullity," the court of appeals determined that the tariff may be declared void as of its date of filing "to ensure that an injustice is not worked on the affected customers." *Ibid.* (internal quotation marks and citation omitted). The court specifically held that such a result was consistent with this Court's decision in *Interstate Commerce Commission* v. *American Trucking Associations*, 467 U.S. 354 (1984), because the FCC voided the tariff "in furtherance of a 'specific statutory mandate' to which the action was 'directly and closely tied.'" Pet. App. 13a (quoting *American Trucking*, 467 U.S. at 367). The court noted that its holding did not leave petitioner

"without opportunity to seek redress," because petitioner could still "seek compensation under the interconnection agreement before the [Massachusetts] DTE as well as to seek a negotiated compensation settlement with Verizon." *Id.* at 14a.[4]

ARGUMENT

Petitioner no longer disputes the FCC's conclusion that its tariff was unlawful because it violated two of the Commission's rules. Nor does petitioner contend that the decision below conflicts with that of any other court of appeals. Instead, petitioner argues (Pet. 9-15) that this Court should grant certiorari because the unanimous decision of the court of appeals conflicts with this Court's decision in *American Trucking*. No such conflict exists.

1. The issue in *American Trucking* was whether the Interstate Commerce Commission (ICC) had the "authority to reject effective tariffs that have been submitted in substantial violation of rate-bureau agreements." 467 U.S. at 355. The Court first concluded that Congress had not expressly given the ICC the power to take such action, see *id.* at 361-364, rejecting the claim that such authority was conferred by a provision that authorized the ICC to "reject a tariff * * * if that tariff violates this section or regulation of the Commission carrying out this section," *id.* at 361 (quoting 49 U.S.C. 10762(e)). The Court stated that "the term 'reject' connotes a refusal to receive at the threshold," *id.* at 362, and reasoned that concluding that Section

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[4] The court of appeals also rejected petitioner's contention that the Commission violated its own rules and petitioner's due process rights by basing its decision on arguments not made by either party. Pet. App. 7a-9a. Petitioner does not renew that argument here.

10762(e) permitted the ICC to reject effective tariffs would disrupt the statutory scheme because it would undermine "the procedural safeguards * * * that Congress built into remedies clearly designed to reach effective tariffs," *ibid.*

The Court nevertheless concluded that the ICC's actions had been lawful. See 467 U.S. at 363-370. The Court stated that "the Commission may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals," *id.* at 365, and held that "[t]o lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria: first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate," *id.* at 367. The Court determined that the first requirement was satisfied because Section 10706(b)(3) of the Motor Carrier Act of 1980, 49 U.S.C. 10706(b)(3), "prescribes the guidelines for rate-bureau agreements" and because "the procedures governing the administration of [that Section] demonstrate that Congress envisioned that the Commission * * * would be the primary enforcer of the guidelines." 467 U.S. at 368. The Court held that the ICC's action was "directly and closely tied" to its statutory mandate because it was "directly aimed at ensuring that motor carriers comply with the guidelines established by Congress" and because it was "within the Commission's discretion to decide that the only feasible way to fulfill its mandate is to condition approval of motor-carrier tariffs on compliance with approved rate-bureau agreements." *Id.* at 367, 370.

2. In *American Trucking*, this Court was clear that the "specific statutory mandate" and "directly and closely" criteria utilized in that case apply *only* when

Congress has not expressly authorized an agency to declare that previously filed tariffs are unlawful. See 467 U.S. at 367. Although petitioner disputes its conclusion (Pet. 4, 12-13), the D.C. Circuit here held that 47 U.S.C. 208 (1994 & Supp. V 1999) does grant the FCC the "authority, upon complaint by an injured party, to adjudicate the lawfulness of a carrier's past and present rates and practices." Pet. App. 12a (quoting *Hi-Tech Furnace Sys., Inc* v. *FCC*, 224 F.3d 781, 786 (D.C. Cir. 2000)). Accordingly, the court of appeals had no need to apply the *American Trucking* criteria here. To even reach the question on which petitioner seeks review, therefore, this Court would first need to resolve the antecedent question of whether the court of appeals erred in concluding that the Commission had express authority to do what it did here—a question on which the petition does not seek review. That in itself is a sufficient reason to deny certiorari.

3. Even if *American Trucking* were applicable here, petitioner errs in asserting that the D.C. Circuit's holding is inconsistent with it. Section 201(b) of the Communications Act requires that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate] communication service * * * be just and reasonable," 47 U.S.C. 201(b), and the same Section confers upon the FCC authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]," *ibid.* Furthermore, Section 203 of the Act grants the FCC the authority to regulate the form and content of tariffs. 47 U.S.C. 203. Pursuant to these grants of authority, the Commission has issued rules requiring that tariffs "contain clear and explicit explanatory statements regarding the rates and regulations,"

47 C.F.R. 61.2(a), and prohibiting tariffs from "mak[ing] reference to * * * any other document or instrument," 47 C.F.R. 61.74(a).

The FCC's action here was taken pursuant to its "specific statutory mandate" to enforce Section 201(b) and Section 203, and it was "directly and closely tied to that mandate" because it was necessary to prevent the applicability of a clearly illegal tariff. Pursuant to 47 C.F.R. 61.23(c), petitioner's tariff was filed on one-day's notice and took effect the next day. As the court of appeals aptly noted: "Merely because a tariff is presumed lawful upon filing does not mean that it is lawful. Such tariffs still must comply with the applicable statutory and regulatory requirements." Pet. App. 13a. The Commission's actions here were necessary to prevent petitioner from reaping a benefit from a tariff that even petitioner now concedes was illegal when filed.[5] Further review is not warranted.

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[5] Two of the factors that lessened the Court's concerns about possible harshness of retroactive invalidation in *American Trucking* are present here. Petitioner's tariff was clearly unlawful under FCC regulations, and it is at least "unclear" whether it was even permissible for petitioner to file a tariff dealing with ISP-bound traffic at all because "[t]he FCC has not authorized, let alone required, carriers to file tariffs for local Internet-bound traffic." Pet. App. 13a; cf. *American Trucking*, 467 U.S. at 370-371. In addition, the Commission took action only after formal proceedings, and petitioner was afforded a right to judicial review. Cf. *id.* at 371.

Any potential unfairness is further diminished by two additional factors. First, as both the Commission and the court of appeals observed, petitioner has available to it mechanisms for obtaining compensation for its handling of ISP-bound traffic notwithstanding the invalidation of its tariff. See pp. 7-9, *supra*. Moreover, the situation presented is entirely of petitioner's own making. Petitioner could have negotiated an agreement with Verizon that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2001

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clearly required compensation for local ISP-bound traffic. Pet. App. 24a-25a. Instead, it entered into an agreement that it knew that Verizon understood as not applying to such traffic and agreed to have the Massachusetts DTE resolve the controversy. *Id.* at 25a; see also *id.* at 14a ("That [petitioner] sought to game the existing rules, and lost, does not mean the FCC was arbitrary and capricious in its application of its own rules.").

Supreme Court, U.S.
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No. 01-543

IN THE
Supreme Court of the United States

GLOBAL NAPS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF VERIZON

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November 28, 2001

18 pp

QUESTION PRESENTED

Whether the D.C. Circuit, in the particular circumstances of this case, correctly upheld the FCC's determination that an indeterminate tariff, filed in violation of the agency's rules, was void *ab initio*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the Verizon telephone companies* state the following:

Verizon Communications Inc. is the ultimate parent of each of the respondent Verizon telephone companies. No publicly owned company owns 10% or more of the stock of Verizon Communications Inc.

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* The Verizon telephone companies are the affiliated local telephone companies of Verizon Communications Inc., which include the telephone companies formerly affiliated with GTE Corporation. None of the Verizon telephone companies formerly affiliated with GTE Corporation was a party in the court of appeals. The following Verizon telephone companies were intervenors in the court of appeals: Verizon Delaware Inc. (f/k/a Bell Atlantic-Delaware, Inc.), Verizon Maryland Inc. (f/k/a Bell Atlantic-Maryland, Inc.), Verizon New England Inc. (f/k/a New England Telephone and Telegraph Company), Verizon New Jersey Inc. (f/k/a Bell Atlantic-New Jersey, Inc.), Verizon New York Inc. (f/k/a New York Telephone Company), Verizon Pennsylvania Inc. (f/k/a Bell Atlantic-Pennsylvania, Inc.), Verizon Virginia Inc. (f/k/a Bell Atlantic-Virginia, Inc.), Verizon Washington, DC Inc. (f/k/a Bell Atlantic-Washington, D.C., Inc.), and Verizon West Virginia Inc. (f/k/a Bell Atlantic-West Virginia, Inc.).

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IN THE

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GLOBAL NAPS, INC.,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF VERIZON

The Verizon telephone companies respectfully oppose the petition for a writ of certiorari filed by Global NAPs, Inc. ("GNAPs"). In the agency orders underlying the decision of the D.C. Circuit, the Federal Communications Commission ("FCC") held that provisions of GNAPs' filed tariff were invalid on their face because they were "unjust and unreasonable under section 201(b)" of the Communications Act of 1934, 47 U.S.C. § 201(b). Pet. App. 37a; *see also id.* at 16a, 29a. The court of appeals affirmed that conclusion, holding that GNAPs' tariff was a "patently unlawful" attempt "to game the existing rules." *Id.* at 13a-14a.

GNAPs challenges neither the legal standard applied by the court below nor the determination that GNAPs' filed tariff was unlawful. Nor does GNAPs challenge the FCC's authority to declare a filed tariff void *ab initio* under appropriate circumstances. Instead, GNAPs claims only that, under the particular circumstances of this case, the court of appeals, applying the standard set forth in *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984), erred

in affirming the FCC's conclusion that the tariff was void *ab initio*. Such fact-specific application of an unchallenged legal standard does not merit review by this Court. In any event, GNAPs' challenge to the holding in this case is without merit. The Court should deny the petition.

STATEMENT OF THE CASE

1. This case is an obscure skirmish in a continuing regulatory battle over implementation of one provision of the Telecommunications Act of 1996 (the "1996 Act"), 47 U.S.C. § 251(b)(5). Section 251(b)(5) requires local exchange carriers ("LECs") to establish "reciprocal compensation" arrangements for the transport and termination of certain types of telecommunications traffic. In a reciprocal compensation arrangement, when caller A (served by carrier X) calls end-user B (served by carrier Y), carrier X pays carrier Y to complete the call. Local telephone companies (also called "local exchange carriers") must include reciprocal compensation arrangements in the "interconnection agreements" that they negotiate under the 1996 Act. *See* 47 U.S.C. § 251(c)(1).

Reciprocal compensation does not apply, however, to interstate access calls, including exchange access and information access calls. *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001) (*"ISP Remand Order"*), *petitions for review pending*, Nos. 01-1218, *et al.* (D.C. Cir.).[1] In particular, as the FCC has recently reiterated, reciprocal compensation does not apply to calls placed to the Internet through an Internet service provider ("ISP") like AOL. *Id.* at 9152-53, ¶ 1. Moreover, because calls to the Internet flow in only one direction (and are in no sense "reciprocal"), the FCC has

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[1] Roughly speaking, the distinction is between purely local calls — which are subject to reciprocal compensation — and calls that continue to points outside the local calling area — which are not.

concluded that requiring payments on these calls fosters uneconomic arbitrage and discourages local telephone competition. *Id.* at 9181-86, ¶¶ 67-76. Indeed, in those circumstances, a competing carrier that signed up its own local telephone customers would both lose the ability to reap these arbitrage payments and risk having to make such payments to other carriers to boot. As a result, the FCC has concluded that such payments "undermine the operation of competitive markets" by rewarding carriers "that compete, not on the basis of the quality and efficiency of the services they provide, but on the basis of their ability to shift costs to other carriers." *Id.* at 9183, ¶ 71.

Nevertheless, prior to the FCC's most recent order, the FCC declined to pre-empt state commission authority over inter-carrier compensation for Internet-bound traffic. As a result, a number of state commissions, relying on a mistaken understanding of section 251(b)(5), had required incumbent LECs — companies like Verizon — to pay reciprocal compensation on one-way calls to the Internet. The decisions by state regulators were mixed, however, and other state commissions rejected a requirement to make reciprocal compensation payments for Internet-bound traffic. Among the latter, the Massachusetts Department of Telecommunications and Energy (the "DTE"), reversing its own earlier order, recognized that Internet-bound traffic is not subject to reciprocal compensation, and that "unqualified payment of reciprocal compensation for ISP-bound traffic . . . does not promote real competition in telecommunications" but instead provides "an unintended arbitrage opportunity . . . . A loophole, in a word." Order, *MCI WorldCom, Inc. v. New England Tel. & Tel. Co.*, D.T.E. 97-116-C, 1999 WL 634357, at *15 (Mass. Dep't of Telecomms. & Energy May 26, 1999).[2] In states, like

[2] The FCC has affirmed that such decisions are correct, and has effectively barred the payment of reciprocal compensation for Internet-bound traffic in those states where such compensation

Massachusetts, where reciprocal compensation was not required for Internet-bound calls, all carriers were required to recover their costs from their own customers — just as Verizon and other incumbent LECs have always been required to do. *ISP Remand Order*, 16 FCC Rcd at 9188, ¶ 80.

2. GNAPs is among the companies that have exploited the "regulatory arbitrage" opportunity (*id.* at 9184, ¶ 74) created by state commission decisions requiring payment of reciprocal compensation on one-way calls bound for the Internet. At some point, GNAPs recognized that the "windfall" provided by such payments (*id.* at 9183, ¶ 70) would be eliminated when state commissions conformed their interpretation of carriers' reciprocal compensation obligations to the requirements of federal law. In an attempt to forestall this result, GNAPs filed a federal tariff containing the provisions at issue in this case.

The underlying purpose of GNAPs' tariff is clear — to ensure the continued flow of reciprocal compensation payments on calls to the Internet without regard to the contrary determinations of state public utility commissions. To this end, GNAPs' tariff provided in relevant part:

> This tariff applies to all ISP-bound traffic for which [GNAPs] does not receive compensation from the Delivering LEC under the terms of an interconnection agreement entered into pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended (an "Interconnection Agreement").

Pet. App. 87a (GNAPs Tariff FCC No. 1, at 82, § 7A.1).

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was not required under state commission decisions as of April 2001. *ISP Remand Order*, 16 FCC Rcd at 9188, ¶ 80 & n.152. This case addressed only the period prior to that order.

GNAPs' tariff is a "heads-I-win, tails-you-lose" tariff. If state commissions required a "Delivering LEC" to pay reciprocal compensation, fine; if not, then the "Delivering LEC" must pay anyway under the federal tariff, despite a contrary state commission determination.

3. On July 8, 1999, after GNAPs attempted, pursuant to its federal tariff, to bill Verizon for Internet-bound traffic originated by Verizon in Massachusetts, Verizon filed the complaint that gave rise to this proceeding.[3] Verizon claimed, among other things, that GNAPs' tariff was unjust and unreasonable in violation of section 201(b).[4] On December 2, 1999, the Commission granted the complaint and ruled that GNAPs' tariff was void *ab initio* for two reasons. First, the tariff applies only if the "Delivering LEC" does not pay reciprocal compensation "under the terms of an interconnection agreement" — the state-supervised documents that govern the implementation of the 1996 Act by incumbent LECs like Verizon and competitive LECs like GNAPs. Because (in every relevant case) the question whether reciprocal

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[3] Verizon had not previously been aware of GNAPs' tariff, the relevant provisions of which were buried at pages 81-83 of a 150-page tariff. Indeed, GNAPs' position was that merely by continuing to deliver traffic to GNAPs — something that Verizon was required to do under binding federal law — Verizon somehow "ordered" GNAPs' "service" and triggered a payment obligation under the tariff.

[4] Verizon raised several other issues as well. For example, Verizon pointed out that GNAPs' tariff is inconsistent with the FCC's long-standing policy governing arrangements — like the one at issue here — for the joint provision of interstate access. The FCC has long held that carriers must share any per-minute access charges received from the access user for the provision of such service; LECs do not compensate one another in that circumstance. GNAPs had insisted that this rule did not apply to Internet-bound traffic, which, it argued, was local and subject to reciprocal compensation for that reason. GNAPs' claim — embodied in its tariff — that Internet-bound traffic was interstate access traffic but nonetheless subject to payment of reciprocal compensation was both legally incoherent and inconsistent with the position that it had taken elsewhere.

compensation was required "under the terms of an interconnection agreement" was subject to litigation and not yet resolved, GNAPs' tariff was indeterminate. "The contingent and unclear applicability of the tariff defies the Commission's longstanding interpretation of section 201(b) of the Act, as reflected in [47 C.F.R. §] 61.2." Pet. App. 55a. Second, the Commission found that the tariff violated one of the Commission's rules implementing section 201(b), that is, 47 C.F.R. § 61.74(a), which prohibits tariffs from referring to "any other document or instrument." *See* Pet. App. 56a; *see also id.* at 32a.

GNAPs filed a petition for reconsideration principally raising procedural objections that are not relevant here. The FCC denied the petition on March 22, 2000. *Id.* at 15a-35a.

4. The D.C. Circuit denied GNAPs' subsequent petition for review. *Id.* at 1a-14a. After disposing of GNAPs' procedural arguments, the court upheld the FCC's determination that GNAPs' tariff contained an illegal cross-reference, holding that "it is unmistakable that the application of the tariff is contingent upon whether GNAPs is paid 'under the terms of an interconnection agreement.'" *Id.* at 10a. "The tariff, on its face, violates the FCC's rule." *Id.* The court likewise affirmed the FCC's conclusion "that the tariff violates 47 C.F.R. § 61.2(a) which provides that tariffs must be clear and explicit." *Id.* at 10a-11a. Because the application of GNAPs' tariff was contingent on the outcome of pending administrative and judicial proceedings, "a party could not reasonably ascertain the 'proper application' of the tariff at the time it was filed." *Id.* at 11a. For this reason, the FCC properly concluded that "the tariff was unclear and therefore was invalid." *Id.* GNAPs does not challenge those conclusions here.

The court of appeals likewise rejected GNAPs' argument that the FCC had erred by "'retroactively invalidating' the tariff." *Id.* at 12a. The court noted that

GNAPs itself had acknowledged that "'[a] tariff that is so plainly defective as to be a legal nullity may be declared retroactively invalid — *void ab initio* — in order to ensure that an injustice is not worked on the affected customers.'" *Id.* at 13a (quoting GNAPs' D.C. Cir. Br. at 36). The court concluded:

> That was the case here. The FCC found that the tariff, on its face, violated the plain meaning of the FCC's tariff regulations and therefore was unlawful from the date of issuance. This is sufficient to satisfy the test laid out in *American Trucking Ass'ns* as the FCC voided a tariff in furtherance of a "specific statutory mandate" to which the action was "directly and closely tied." 467 U.S. at 367.

Id. at 13a. The fact that "GNAPs sought to game the existing rules, and lost, does not mean the FCC was arbitrary and capricious in its application of its own rules." *Id.* at 14a.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S CHALLENGE TO THE FACT-SPECIFIC APPLICATION OF AN ACCEPTED LEGAL STANDARD PRESENTS NO ISSUE WORTHY OF REVIEW

GNAPs admits that, under this Court's decision in *American Trucking*, "the FCC may retroactively cancel a tariff . . . if exercising that authority in a particular case furthers a specific statutory mandate and is directly and closely tied to that mandate." Pet. 4. In the decision below, the D.C. Circuit held that the FCC had properly determined that GNAPs' tariff was void *ab initio* "in furtherance of a 'specific statutory mandate' to which the action was 'directly and closely tied.'" Pet. App. 13a (quoting *American Trucking*, 467 U.S. at 367). GNAPs' petition thus rests on the claim that the court of appeals erred in the application of a legal standard that GNAPs itself asserts is correct. GNAPs' petition is

thus a paradigm case where "the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

GNAPs attempts to manufacture a legal issue by arguing that this case presents the question whether a tariff can be invalidated under the *American Trucking* standard solely for violating an agency regulation. Pet. 14. That question is simply not presented here, however, because the FCC made abundantly clear that GNAPs' tariff was invalidated because it was unjust and unreasonable under section 201(b) of the Communications Act. *See* Pet. App. 37a ("the challenged provisions . . . are unjust and unreasonable under section 201(b) of the Act"); *id.* at 55a ("[t]he contingent and unclear applicability of the tariff defies the Commission's long-standing interpretation of section 201(b) of the Act"); *id.* at 57a (tariff "unlawful under section 201(b) of the Act"); *id.* at 29a (tariff not "sufficiently definite to comply with section 201 of the Act"); *id.* at 32a (noting that 47 C.F.R. § 61.74(a) "implement[s] section 201(b) of the Act"). The D.C. Circuit recognized this as well. *Id.* at 6a ("[T]he FCC declared GNAPs' tariff unlawful under section 201(b) and *void ab initio*."). GNAPs' claim that the FCC invalidated its tariff "merely because it conflicted with the FCC's own regulations" (Pet. 4) is thus inconsistent with the explicit terms of the decisions below.

GNAPs itself conceded before the court of appeals that if its tariff was "'so plainly defective as to be a legal nullity'" it "'may be declared retroactively invalid.'" Pet. App. 13a (quoting GNAPs' D.C. Cir. Br. at 36). The court duly noted the concession and found that GNAPs' tariff flunked that test. *Id.* Accordingly, GNAPs cannot plausibly argue that the D.C. Circuit applied the wrong legal standard in deciding the case below, because the court accepted GNAPs' *own* formulation of that legal standard. The court simply did not agree with GNAPs' application of that standard to the circumstances of this

case. GNAPs' petition thus does not satisfy the standards for review in this Court.

II. GNAPs' PETITION IS MERITLESS

The D.C. Circuit held that the FCC had acted within its authority when it invalidated *ab initio* a tariff that facially violated the FCC's implementing rules. That decision is correct.

For purposes of its petition, GNAPs does not contest that the FCC correctly concluded that its tariff facially violated two FCC regulations. The first of these regulations, 47 C.F.R. § 61.2(a), embodies the basic principle that a tariff must be sufficiently clear and explicit "to remove all doubt as to their proper application." The second regulation, 47 C.F.R. § 61.74(a), prohibits cross-references to documents outside of the tariff itself. As a result of these deficiencies, GNAPs' tariff failed to provide potential "customers" notice of the terms under which GNAPs would provide "service."

Accordingly, this case is controlled by *Security Services, Inc. v. K Mart Corp.*, 511 U.S. 431, 443 (1994). There, the Court upheld a district court's refusal to enforce a tariff where the filing carrier had failed to maintain effective participation in an industry mileage guide. The lower court had based its decision on an Interstate Commerce Commission regulation that provided that such a defect rendered a tariff "'void as a matter of law.'" *Id.* at 436 (quoting 49 C.F.R. § 1312.4(d) (1993)). The Court affirmed, noting that such a regulation did not work any retroactive invalidation, and the *American Trucking* test did not apply. Rather, "once cancellation of participation is published, . . . the mileage-based tariff is incomplete, and 'cease[s] to satisfy the fundamental purpose of tariffs: to disclose the freight charges due to the carrier.'" *Id.* at 437. "[I]n effect [the carrier] had no rates on file because its tariff lacked an essential element." *Id.* at 440.

The same is true here: because GNAPs' tariff was, by its terms, contingent on the outcome of other regulatory and judicial proceedings, the tariff failed to disclose the charges due under the tariff and GNAPs was not entitled to rely on it — it was void upon filing. *Cf. Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) (FCC may "reject tariff filings summarily" under section 201 when the tariff suffers from "technical or procedural flaws") (citing *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972)); *see also id.* at 209 (Williams, J., dissenting) ("Once the Commission reasonably finds a tariff in violation of its clear statement rules, it has authority to reject the tariff outright.").

Moreover, even if — as GNAPs argues and the D.C. Circuit assumed below — the *American Trucking* standard for retroactive invalidation applies, this case easily satisfies that standard. As the FCC made clear in its initial order below, the requirement that a tariff be clear and explicit reflects "the Commission's long-standing interpretation of section 201(b) of the Act." Pet. App. 55a. Despite GNAPs' arguments, in other words, the requirement embodied in 47 C.F.R. § 61.2(a) *is* a requirement imposed by Congress in section 201(b); it is an aspect of Congress's general prohibition on "unjust and unreasonable" practices. Likewise, the FCC made clear that its prohibition on cross-references in 47 C.F.R. § 61.74(a) "implement[s] section 201(b)." *Id.* at 32a.

In holding GNAPs' tariff void *ab initio*, the FCC thus acted in furtherance of the mandate of section 201(b) and in a manner directly and closely tied to that mandate. Because tariffs impose binding legal obligations on those that are subject to their terms, carriers have a special responsibility to ensure that the terms of such tariffs are clear and explicit. As this Court has held, "an incomplete tariff insufficient to support a reliable

calculation of charges" cannot support recovery at all. *Security Services*, 511 U.S. at 443. Otherwise, the tariff itself — by disguising its eventual effect — could promote a carrier's effort to impose unjust and unreasonable charges.

The tariff that GNAPs filed provides a vivid illustration of the risks for regulatory gamesmanship against which the FCC's rules protect. GNAPs' tariff requires compensation *only* if compensation is not *due to be paid* pursuant to an interconnection agreement. Because Verizon's obligation to pay compensation under the controlling interconnection agreements was (and remains) subject to litigation in every relevant case, GNAPs' tariff was indeterminate: it would spring retroactively into effect once GNAPs' claims for compensation under the controlling interconnection agreements were eventually extinguished.[5] As GNAPs must concede for purposes of its petition, it was impossible for parties that are purportedly subject to GNAPs' tariff to tell whether the tariff applied at all. In such circumstances, the D.C. Circuit rightly concluded that the tariff was a "legal nullity" and void when filed.

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[5] Even if it were determined that the parties had *agreed* that no compensation should be paid, GNAPs' tariff would purport to reverse that result — itself a clear violation of 47 U.S.C. § 252(a)(1), which provides that interconnection agreements are "binding."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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